Supreme Court, U.S.
FILED
NOV - 8 2000
OFFICE OF THE CLERK

Docket No. 00-884

Supreme Court of the United States

FRANK SCHNEIDER, JR. and SUSAN SCHNEIDER,

Plaintiffs-Appellants-Petitioners,

vs.

STATE INVESTIGATOR DONALD SIMONINI and DEPUTY CHIEF ROBERT T. BUCCINO,

Defendants-Respondents-Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a denial of due process under the due process and equal protection provisions of the Fourteenth Amendment, and the due process and taking provisions of the Fifth Amendment, to the United States Constitution, for Justices of the highest Court of a state to hear an appeal of a judgment in an action under 42 *U.S.C.A.* § 1983 brought by Plaintiffs against high level Investigators of the Office of the Attorney General of the State, as defendants, where such Justices held the office of the Attorney General and position of chief executive officer in charge of the said investigators while the action was pending, and of which one Justice was the Attorney General and chief executive officer in charge of the said Investigators when the actions by the Investigators forming the basis for the 42 *U.S.C.A.* § 1983 were committed?

2. The same question as above, adding to the foregoing facts, that the two Justices in question commanded two (2) of the seven (7) votes of the Court, and two (2) of the four (4) deciding votes, in a four (4) to three (3) split decision of the said Court, in favor of the said defendants and former charges of said Justices in said capacities of Attorney General.

3. The same questions as above, adding to the foregoing facts, that the refusal by the two Justices in question, Honorable Deborah T. Poritz, Chief Justice, and Honorable Peter Viernero, Justice, to disqualify themselves, was contrary to clear Court Rules in New Jersey, and well established precedent in New Jersey, creating an inference of bias and impropriety.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS IN CASE

There are three reported decisions in this case:

1. *Schneider v. Simonini*, 163 N.J. 336, 749 A.2d 336, 2000 N.J. LEXIS 142 (2000), on which review is sought herein [A3][1];

2. The said decision is the affirmance on appeal of the decision of the New Jersey Appellate Division, reported in *Schneider v. Simonini*, 314 N.J. Super. 583, 715 A.2d 1018, 1998 N.J. Super. LEXIS 392 (App. Div. 1998), decided September 8, 1998 [A51], the latter reversing the trial court; and

3. Certification for appeal was report in *Schneider v. Simonini*, 158 N.J. 685, 731 A.2d 45,1999 N.J. LEXIS 559 (1999).

[1] References to "A#" are to the Appendix annexed.

BASIS FOR JURISDICTION OF THIS COURT

The Order of the New Jersey Supreme Court, of which review is sought by this Court, was entered on August 10, 2000 [A1].

That Order was entered on a combined motion for disqualification of two Justices of the New Jersey Supreme Court, Honorable Deborah T. Poritz, Chief Justice, and Honorable Peter Viernero, Justice, and upon such disqualification for reconsideration of the Order entered by the Court on March 6, 2000, reported in *Schneider v. Simonini*, 163 N.J. 336, 749 A.2d 336, 2000 N.J. LEXIS 142 (2000) [A3].

Therefore, although it is the first above mentioned order of which review is sought, it is integrally related to the second order.

The latter order affirmed the decision and order of the New Jersey Appellate Division, entered on September 8, 1998, reported at *Schneider v. Simonini*, 314 N.J. Super. 583, 715 A.2d 1018, 1998 N.J. Super. LEXIS 392 (App. Div. 1998) [A51].

The jurisdiction of this Court is conferred by 28 *U.S.C.A.* § 1257, based upon this being a decision of the highest court of the state, affecting a constitutional right of Plaintiffs.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, AND REGULATIONS INVOLVED IN CASE

U.S. Constitution, Amend. 5

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amend. 14 § 1

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The federal constitutional questions sought to be reviewed by this Court first arose when the two Justices of the New Jersey Supreme Court, Honorable Deborah T. Poritz, Chief Justice, and Honorable Peter Viernero, Justice, failed to disqualify themselves upon the hearing by the Court of the appeal of the Appellate Division, reported at *Schneider v. Simonini*, 715 A.2d 1018, 1998 N.J. Super. LEXIS 392 (App. Div. 1998) [A51].

According to New Jersey Court Rules discussed herein, a Judge in New Jersey is required to disqualify himself or herself on the Judge's own motion, where disqualification is called for by the Rules, without the need for a motion by a party.

The Justices having not done so, and it being Plaintiffs' contention that they should have done so, Plaintiffs then brought the motion for recusal/disqualification, and upon such recusal, reconsideration of the decision on appeal of March 9, 2000[A3], resulting in the order on which review is sought [A1].

Accordingly, the issue of the violation of Plaintiffs' constitutional rights by reason of the actions of the said Justices did not become at issue until their failure to recuse themselves, and was thus raised first on the said motion for disqualification and reconsideration. See Plaintiffs' "Statement" on said motion, annexed at A66, and particularly "Introduction", at A68, Point V at A82 (Due Process), and Point IV at A81 (Equal Protection).

Defendants did not oppose Plaintiffs' motion for disqualification and reconsideration. No opinion was issued by the New Jersey Supreme Court in connection with the Order denying the motion for recusal and reconsideration.

The action the subject of this Petition and the appeals discussed herein, was commenced in 1991, as the Court noted in its decision, based upon an arrest of plaintiff Frank Schneider in 1989. As noted in the decisions, Plaintiffs' claims were under 42 *U.S.C.A.* § 1983. The claims were based upon an arrest of Plaintiff Frank Schneider, Jr., who was not the Frank Schneider Defendants' Simonini and Buccino were seeking to arrest.

It was Plaintiffs' contention that the arrest was both without probable cause, and that it was not objectively reasonable for Defendants to make the mistake that they made. The trial court agreed, and granted summary judgment to Plaintiffs. The Appellate Division reversed [A51]. The Supreme Court granted certification to appeal (*Schneider v. Simonini,* 158 N.J. 685, 731 A.2d 45,1999 N.J. LEXIS 559 (1999)). On the appeal, the Supreme Court, in a divided court (4 to 3), affirmed the decision of the Appellate Division [A3].

Three members of this Court found that there was no probable cause for the arrest of plaintiff, and voted against finding qualified immunity.[2] Both opinions of the Court quoted Buccino, Simonini's superior--in the exculpation of Buccino from supervisory liability--in his description of Simonini as an "experienced, well-trained" officer.

Defendant Simonini was a senior Investigator with the Attorney General's office. Defendant Buccino was his supervisor.

According to Buccino's testimony, operation Lejune was a major investigation, jointly conducted for 10 months by the Division of Law and the Division of Criminal Justice, with the Deputy Attorney Generals working daily with investigators. There were wire taps, meetings, surveillances, audio and video, of 13 known criminals. Over 100 people were involved in the arrests of the organized crime people and the innocent Plaintiff (T23 page 35). The arrests were made jointly by the Division of Criminal Justice and the Division of Law, both directly under the Attorney General.

Chief Justice Poritz was Attorney General from January 1994 through July 1996, during which time she was the attorney of record for Defendants, and during which time there was extensive motion practice and the trial (1/9/95-3/16/95).

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[2] Presumably the majority did not vote on that issue, since they voted to find qualified immunity, rendering the issue of actual probable cause moot.

Justice Viernero was Attorney General between July 1996 through August 1999, during which time he was attorney of record for defendants. His tenure included the appeal before the Appellate Division and even after the filing of the Petition for Certification herein. The New Jersey Division of Criminal Justice, as well as Bucccino and Simonini, were named defendants in the caption when under the name Deborah T. Poritz a motion for leave to Appeal to the Appellate Division, and later to the Supreme Court, was made.

As attorneys of record for defendants Simonini and Buccino in this action, the names Poritz and Verniero were listed on court papers, including briefs on motions, and briefs on appeals. The decision and order of the Appellate Division appealed herein lists Justice Viernero as attorney of record for the defendants Simonini and Buccino.

With respect to Justice Verniero, plaintiff's Petition for Certification to this Court was filed in January, 1999. At that time, and until just before his swearing in on September 1, 1999, it is understood, Justice Verniero was attorney of record for the defendants. This means that Justice Verniero was the attorney of record on defendants opposition to plaintiff's Petition for Certification, on this very appeal.

Obviously, upon a recusal of the two Justices in question, this case would have had a different result, without more, as least with respect to defendant Simonini. Without the votes of the two named Justices, the decision of the Court would have been 3 members in favor of reversal as to defendant Simonini, and 2 against, instead of a 4 to 3 affirmance. Furthermore, had the Justices recused themselves on Plaintiff's motion, after which the Court would have granted reconsideration, then it would have resulted in a reversal of the Supreme Court decision and Order affirming the Appellate Division.

ARGUMENT

POINT I

THE PARTICIPATION BY THE NAMED JUSTICES IS A DENIAL OF DUE PROCESS TO THE PLAINTIFF IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND A TAKING OF PROPERTY IN VIOLATION THEREOF

A. The Appearance of Impropriety created by the Justices actions, is alone sufficient to find a violation of Due Processs

It has long been a fundamental rule in American jurisprudence, that "a fair trial in a fair tribunal is a basic requirement of due process." *E.g., In re Murchison*, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955). A necessary component of a fair trial is an impartial judge. *See Ibid.; Tumey v. Ohio*, 273 U.S. 510, 532, 71 L. Ed. 749, 47 S. Ct. 437 (1927). In Murchison, supra the Supreme Court stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio, 273 U.S. 510,*

> *532.* Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States, 348 U.S. 11, 14.*

In Murchison, supra, the judge had heard evidence in advance of the trial, sitting as a grand jury, apparently a prevalent practice in some jurisdictions at that time. The Supreme Court held that it was a violation of the defendant's due process rights under the United States Constitution, for the judge to try the case since the judge had received evidence outside the trial proceeding itself. The Court stated:

> Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred . . .and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.
>
> This incident also shows that the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness. *** If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. n10 In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a

> fair trial to have that right jeopardized in such way.

It is significant to note that disqualification, according to the *Murchison* Court, does not require the existence of actual bias or impropriety. The appearance of impropriety or bias is all that is required, to mandate disqualification ("[b]ut to perform its high function in the best way "justice must satisfy the appearance of justice") .

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986) (involving a split decision of a state's highest court, in a civil case, similar to the situation here), the Court, citing Murchison, stated:

> More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision." Ibid. Nonetheless, a reasonable formulation of the issue is whether the "situation is one 'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'"

The participation in this case by the Chief Justice Poritz and Justice Veniero—in effect, sitting as judges on their own case, where they represented the Defendants as defense attorneys, and over whom Justice Poritz had a supervisory role during the events leading to the wrongful arrest of Plaintiff—is a violation of Plaintiffs' rights under the due process clauses of the Fourteenth and Fifth Amendments of the U.S. Constitution, and a taking of property under the Fifth Amendment. On the latter,

see also, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

B. The Refusal of the Justices to Observe their Own Rules, Contrary to Established Precedence, indicates an Actual Bias by the Justices; there were other Indicia of Actual Bias as well

While this Court will not intervene into the administration by the highest Court of a State of its own laws, there are reasons that the actions of the Justices warrant consideration here. First, the deviation from the law by the Justices is a clear suggestion that the Justices harbored an actual bias, which motivated their actions. That, coupled, with other indicia, make the inference even stronger. In addition, there are indications of actual knowledge and/or actual involvement by the Justices, in this matter. Second, the New Jersey Supreme Court was sitting in this case on a federal constitutional issue, under 42 USC § 1983.

Honorable Deborah T. Poritz, Chief Justice, and Honorable Peter Viernero, Justice, were required, on their own motion, to recuse themselves from the appeal.

New Jersey Court Rule, R. 1:12-1(c) requires that the judge of any court shall be disqualified from sitting on any matter where the judge has been attorney of record or counsel in the action.[3]

R. 1:12-1 requires that where disqualification is required, the judge shall do so on the judges own motion, although under R. 1:12-2 any party may also make a motion for disqualification.

The Code of Ethics, R. 1:14 et seq., similarly applies to all judges of all courts of the State. See also R. 1:18, "It shall be the duty of every judge to abide by and to enforce the provisions of

[3] Under Rule R. 1:1, all rules under Part I are expressly applicable to the courts specified, including the Supreme Court, unless expressly excluded specifically elsewhere.

the Rules of Professional Conduct, the Code of Judicial Conduct . . ."

R. Canon 1 states that a Judge should uphold the integrity and independence of the Judiciary, and that the provisions of the Code should be construed an applied to further that objective.

R. Canon 2(A) states that, "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Referencing and buttressing R. 1:12-1, R. Canon 3 similarly provides for disqualification of a judge, where the judge's impartiality might reasonably be questioned, including but not limited to instances where:

> (a) the judge has. . . personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a witness concerning it;. . .
>
> (c) the judge knows that he or she. . .any other interest that could be affected by the outcome of the proceeding;. . .

R. Canon 3(D) precludes a judge, disqualified by the terms of the Canons, from avoiding the same by obtaining the consent of the parties. R. Canon 3(B)(3)(a) imposes on every judge disciplinary responsibilities for all other judges.

The clear deviation from the well established New Jersey law, by the Justices in this case, creates an appearance of impropriety, and an inference of bias against Plaintiffs.

C. Evidence of Actual Involvement in and/or Knowledge of the Case by the Justices while Attorney General

The foregoing discusses the reasons why it was error for Justices Poritz and Viemero to not recuse themselves, for reasons other than active involvement in the case while Attorney General. Based upon the Rules nothing more should have been required for mandatory recusal. However, there is also evidence of actual involvement in this case. Again, this is not to say that the Justices even remembered any actual involvement. However, that is not the point. If they were involved, if they recall any participation, then it is another reason for the need for recusal.

As aforesaid, according to Buccino's testimony, operation Lejune was a major investigation, jointly conducted for 10 months by the Division of Law and the Division of Criminal Justice, with the Deputy Attorney Generals working daily with investigators. There were wire taps, meetings, surveillances, audio and video, of 13 known criminals. Over 100 people were involved in the arrests of the organized crime people and the innocent Plaintiff (T23 page 35). The arrests were made jointly by the Division of Criminal Justice and the Division of Law, both directly under the Attorney General. It is difficult to imagine that the investigation was not within the personal knowledge of the Attorney General.[4]

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[4] Based upon the testimony of Robert T. Buccino he served on a high level in the Division of Criminal Justice, not that far below the Attorney General. It certainly would be a reasonable inference from facts in the record that all of the Attorney Generals serving while he was in office were aware of his activities.He was Deputy Chief Investigator Division of Criminal Justice (T23 page 3); an Investigator in 1967, (page 4) undercover investigation 1967, (page 5) and worked as a lieutenant in the Intelligence Division headquarters in 1970, (page 7). After retiring in 1984 Buccino was appointed by the Attorney General for New Jersey to initiate a task force on narcotics and organized crime. In 1985 Buccino was the first person hired by the Attorney General to organize these two task

(cont'd)

Thereafter, it became a precedent setting case, with the wrongful arrest of plaintiff, followed by this lawsuit. No one had previously sued the Chief Investigator of the Organized Crime Bureau of the Division of Criminal Justice. No one had ever sued a Senior Investigator of the Division of Criminal Justice at the level of Donald Simonini for false arrest.

During the trial spanning two months, at least two attorneys from the Attorney General's office were present at all times. Former DAG Ershow-Levenberg, one of the trial attorneys, recently advised the undersigned that she and Senior Trial counsel Glenn Jones frequently discussed this matter with their supervisors. In addition, Robert Cody, the third attorney at the trial answered to George Avery, who even attended a settlement conference during the trial. This massive investment of personnel, time, money,and the Chief Investigator, was certainly discussed with the Attorney Generals.

In the alternative, even if there was no active involvement, the knowledge of the case and personnel, during their respective tenures, require recusal. Finally, even if the sitting Justices had no present recollection of their involvement, or what, if any, knowledge they acquired while serving as attorney of record herein, the potential of such information or their relationship with those directly involved, might have affected, or might have appeared to affect, their reasoning, consciously or subconsciously.

D. Additional Indicia of Actual Bias

Justice Verniero's decision made repeated references to the actions of the Attorney General's office [pgs. 6, 14, 16], and specific actions of the attorneys of that office. Those comments,

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forces, (page 11) Buccino organized the narcotics and organized crime task forces, hired 25 investigators who worked directly with the State Police and Deputy Attorney Generals. In 1985 he became the Deputy Chief of Investigators with 62 investigators under his command (page 12). He worked directly with Chief Attorney Bob Carroll (page 15).

coupled with other aspects of the involvement with this case by the Attorney General's office, including Buccino's testimony of the daily involvement in the matter by the Deputy Attorney Generals, could suggest in the eyes of others a concern by the Justices for defending the actions of their attorneys, ahead of the need to make a fair and impartial decision with respect to the issues in this case.

It is irrelevant that neither of the Justices of the Court were Attorney General when the wrongful arrest of Frank Schneider occurred. For six (6) years, the two Justices of the Court were in control of this litigation. They were in charge of those who were handling this case. Senior personnel were involved. It is significant that the Attorney Generals and their senior people did not seek a settlement of the case. In fact the certification of the undersigned herewith attests to the adamant refusal of the Senior Attorney General to discuss any settlement, claiming that none would be permitted by Attorney General Poritz.[5]

This was a case that cried out for settlement--at all times during the past 6 years. Yet, the Office of the Attorney General steadfastly refused to entertain settlement, even after the trial. Instead, Attorney General Viernero decided to appeal to the Appellate Division. There, they were successful, but with a final result where three Justices of the Court--Justices not associated with the Attorney General's office--herein said the Appellate Division was wrong, and the trial court was right.

It is far from, it is respectfully submitted, a mere "fanciful possibility" (*Higgins v. Advisory Comm. on Professional Ethics*, 73 N.J. 123, 129, 373 A.2d 372 (1977)), that the public or other judges might have the perception that the actions by the Justices

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[5] In fact, as plaintiff pointed out in the briefs on appeal, the Attorney General's office exhibited what could only be characterized as an unusually obstinate refusal to seek out a resolution without protracted litigation, nothwithstanding the escalating exposure that the State faced thereby.

here were motivated more by their interest in protecting their former offices as Attorney General, and their reputation arising out of the same, than by their interest in deciding the case on its merits.

That interest, it is respectfully submitted, might be no more than concern for negative reflection on their personal and professional reputation, for their respective failures to recognize that this case should have been settled, in accordance with its merits and the strong public policy pronounced by the Court repeatedly, in favor the resolution of lawsuits in such a manner. *E.g., Karpovich v. Barbarula*, 150 N.J. 473, 482, 696 A.2d 659 (1997); *Ziegelheim v. Apollo*, 128 N.J. 250, 263, 607 A.2d 1298 (1992); *Nolan v. Lee Ho*, 120 N.J. 465, 472, 577 A.2d 143 (1990) (quoting *Jannarone v. W.T. Co.*, 65 N.J. Super. 472, 168 A.2d 72 (App. Div.), certif. denied, 35 N.J. 61 (1961)); *Judson v. Peoples Bank & Trust Co.*, 25 N.J. 17, 35, 134 A.2d 761 (1957). It is not difficult to discern, that, but for the votes of these former Attorney Generals the State would have suffered a substantial liability, a substantial part of which could have been avoided had the case been properly managed during its long-term history.

Certainly, had the Justices voted for reversal herein, they would have been publicly admitting the mismanagement of this case for the previous six years, at a tremendous waste of taxpayer money.

There is ample basis for a perception by the public or other judges of the appearance of impropriety, and from which it would be reasonable to infer that the Justices who formerly defended the defendants herein, and whose attorneys were active participants in the arrest now the subject of this action, were biased in favor of the defendants.

E. The Court Ignored other Established Precedent of the New Jersey Supreme Court, a further indication of actual bias

The inquiry into probable cause, and even more so the objective reasonableness of an officer's belief, is highly factual. Given that premise, in the Supreme Court's "incongruous"

decision, there are numerous factual issues determined by the majority, or the Court, as the case may be, that overlook key facts, or make improper conclusions thereon. Also, the Court improperly invaded the fact-finding of the trial court below, disregarding its own precedents. Finally, the Court, or the majority, as the case may be, did not abide by its own precedents.

It is submitted that a reading of the voluminous testimony of defendants' witnesses, including that of the defendants themselves, would persuade any reasonable person that the claim of efforts to identify the Frank Schneider suspect, and the claim of concern for the informant, are fabricated claims.

It was impossible to even attempt to cover in Plaintiffs' statement, the important facts from testimony of some 27 witnesses, at least 11 of whom were members of law enforcement, the transcript for which is some 4,500 pages, in a trial that commenced on January 9, 1995 and was concluded on March 16, 1995. (Plaintiff requested the opportunity to do so on reconsideration.) The following are a few of those points.

Three members of this Court found that there was no probable cause for the arrest of plaintiff.[6] Both opinions of the Court quoted Buccino, Simonini's superior--in the exculpation of Buccino from supervisory liability--in his description of Simonini as an "experienced, well-trained" officer. Yet, at the same time, a majority of the Court found this supposedly more than competent officer to have been reasonable in his belief that there was probable cause. The incongruity is readily apparent.

The Court's determination as to the reasonableness of reliance on the second-hand information of an informant's informant, was not in accord with the Court's precedents, including the recent decision in *State v. Caldwell*, 158 N.J. 452, 730 A.2d 352 (June 17, 1999).

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[6] Presumably the majority apparently did not vote on that issue, since they voted to find qualified immunity, rendering the issue of actual probable cause moot.

That FBI Agent DeBellis told Simonini that the suspect Frank Schneider was "six feet or more" in height, is not supported by the evidence, and materially affected the decision on the reasonableness of Simonini's belief in the existence of probable cause.

In addition to the fact that the information was highly erroneous, without the "six feet or more" characteristic, there would not have been a scintilla of information in Simonini's possession to link one of the four Frank Schneider's found in the DMV records (the 6'2" one being plaintiff), with the suspect Frank Schneider. This was discussed at length in plaintiff's supplemental brief herein dated November 26, 1999, in the Introduction and Point III, and will not be repeated at length herein. It was not supported by the weight of the evidence.[7] It is submitted that this was overlooked by the majority, if not the entire Court. An examination, again, of Simonini's actual testimony in the two times he appeared during the trial is essential here, because Simonini's testimony and his only written communication differs from the DeBellis stipulation, accepted without testimony.

This was mentioned in plaintiff's briefs on appeal, and should have provided a basis for development on reconsideration. [E.g., Supplemental Brief, Point IV. [not included herewith]] The Court also erred in it's evaluation of the application of confidentiality or secrecy in this particular investigation. There is no dispute regarding the importance of these issues. However, the Court relied on a valid principle which has no applicability here. The record is too extensive to

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[7] E.g., Simonini stated in his written report to his superiors that the only information DeBellis could provide was that he was a "big kid" with a muscular build, with nothing about being 6' tall. [PADa 28, second paragraph]. Neither Simonini nor Buccino remembered DeBellis having mentioned the "6', 6'2"". See e.g. defendant Simonini's testimony at 9T92:11-20; defendant Buccino's testimony at 23T10-12; 150:1-5.

cite here. One example is that there is no relationship between being concerned for the anonymity of an informant and ceasing to establish Schneider's identity. Bonura could not identify the hijacker Frank Schneider, Jr. However, he knew his father, the organized crime member; and he could easily have identified a photograph of the father which through a cursory investigation could be linked to the son. This contorted excuse for conducting no investigation should not be condoned. Law enforcement agencies, county, state, local and even corrections could have been checked but were not.

The record shows that there was no reasonable basis that the issue of confidentiality limited the Deputy Attorney Generals or State investigators from conducting a discrete and completely covert verification of the identity of the Frank Schneider who hijacked the truck.

FBI Agent DeBellis and the only taped reference to Frank Schneider, Jr. (in April 1989) specifically mentioned that the hijacker was the son of a known mob related figure, Frank Schneider, Sr. nicknamed "Spider". It would have been easy to verify the father and son. This deliberately falsified excuse by Simonini suggests that the resources of our entire Division of Criminal Justice could not confirm who a person is (when records exist on the person and his father) without compromising an investigation. This perverse logic is insulting. Nothing in the record supports this fabrication. The evidence at the trial was that Frank Schneider Sr. and Jr., the criminals, were arrested together in Montville and photographs existed in the files. Plaintiff had been arrested for municipal violations and had been on probation. His photo existed in Lodi and Bergen County. There are hundreds of ways to covertly establish the identify of someone. Professional law enforcement officers regularly obtain such information without compromising an investigation, especially where dealing with organized crime.

Witness after witness said that they would have done more, or that there are many ways to confirm identification, or that the photos could have been examined or other investigative efforts undertaken. There are many references in the testimony

of the police expert, common sense, and basic techniques. Plaintiff states that the trial transcript proves that Simonini made up the excuse of confidentiality here, and that both parties' witnesses provided evidence that he did not act reasonably.

A DCJ investigator could easily have contacted a member of the Bergen County Prosecutor's Office (see testimony of O'Conner and Gonzalez) or a trusted local police officer who could assert that he is investigating a Municipal Court warrant for a failure to appear on a motor vehicle infraction--or the probation department wants information on Frank Schneider Jr. for failure to pay a fine or failure to make child support payments. These activities are routine. The informant Bonura was never consulted to see how he might suggest verifying the ID of Frank Schneider.

No one disputed the importance of confidentiality. However, the Defendants did not produce any valid response to the many questions when asked on cross examination why they did not try one of many methods to covertly establish someone's identity. Their excuse is insulting. The Division of Criminal Justice cannot reasonably argue that by using a trusted person in insurance, real estate, banking, fraud and other agencies—to help confirm the identity of the two Frank Schneider, Jr's.—would have jeopardized the informant. In a truly covert operation even the contact person would not be told the reason why someone is verifying the identity of a person. None of these were done here.

The Court should have been incensed that such a false argument was ever presented and argued by the Attorney General's Office.

With respect to defendant Buccino, the Court improperly invaded the domain of the trial court, contrary to its own well established precedent. This was one of plaintiff's central points in its brief's on appeal, which it would appear the entire Court overlooked. E.g., Petition for Certification, January 23, 1999, Point II; Supplemental Brief, Points VI, VII [not included herewith]. The Court does not find that the trial court misunderstood or misapplied the law with respect to defendant

Buccino. It simply made a different finding of fact. This was an improper invasion of the domain of the trial court.

It is respectfully requested that the writ be granted.

Dated: November 8, 2000

Respectfully submitted,

/s/*Vincent J. D'Elia*

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ON THE BRIEF:
VINCENT J. D'ELIA

Docket No. _____

Supreme Court of the United States

FRANK SCHNEIDER, JR. and SUSAN SCHNEIDER,

Plaintiffs-Appellants-Petitioners,

vs.

STATE INVESTIGATOR DONALD SIMONINI and DEPUTY CHIEF ROBERT T. BUCCINO,

Defendants-Respondents-Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

APPENDIX

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APPENDIX

A. Opinions, orders, findings of fact, and conclusions of law of which Review is Sought Herein

1. Order New Jersey Supreme Court, filed August 10, 2000, denying Plaintiff's motion for disqualification of Honorable Deborah T. Poritz, Chief Justice, and Honorable Peter Viernero, Justice, and for reconsideration of the Decision and Order of the New Jersey Supreme Court, decided on March 9, 2000 [A3] [There was no opinion with or in support of this Order]

SUPREME COURT OF
NEW JERSEY
M-1280/1281
46,790

FRANK SCHNEIDER, JR., et al.,
and SUSAN SCHNEIDER,

Plaintiffs-Movants,

vs.

DONALD SIMONINI, et al.,

Defendants-Respondents,

ORDER
FILED
Aug 10 2000
/s/Stephen Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion for disqualification of certain Justices (M-1281) is denied; and it is further

ORDERED that the motion for reconsideration of the Opinion (M-1281) is denied.

WITNESS, the Honorable Deborah T. Poritz,, Chief Justice, at Trenton, this 13th day of July, 2000.

I hereby certify that the foregoing is a true copy of the original on file in my office.
/s/Stephen Townsend
CLERK OF THE SUPREME COURT OF NEW JERSEY

/s/Stephen Townsend
CLERK OF THE
SUPREME COURT

2. Decision and Order by New Jersey Supreme Court on March 6, 2000, reported in *Schneider v. Simonini*, 163 N.J. 336, 749 A.2d 336, 2000 N.J. LEXIS 142 (2000), affirming Decision and Order of New Jersey Appellate Division, reported at *Schneider v. Simonini*, 314 N.J. Super. 583, 715 A.2d 1018, 1998 N.J. Super. LEXIS 392 (App. Div. 1998), and decided September 8, 1998 [A51]

FRANK SCHNEIDER, JR., and SUSAN SCHNEIDER, Plaintiffs-Appellants, v. STATE INVESTIGATOR DONALD SIMONINI and DEPUTY CHIEF ROBERT T. BUCCINO, Defendants-Respondents, and NEW JERSEY DIVISION OF CRIMINAL JUSTICE, STATE INVESTIGATOR JOHN POST, STATE INVESTIGATOR ANDREW O'CONNOR, CARLOS RODRIGUEZ and JOHN D'ANGELO, Defendants.

A-84 September Term 1998

SUPREME COURT OF NEW JERSEY

163 N.J. 336; 749 A.2d 336; 2000 N.J. LEXIS 142

November 8, 1999, Argued

March 6, 2000, Decided

PRIOR HISTORY:

[***1] On certification to the Superior Court, Appellate Division, whose opinion is reported at *314 N.J. Super. 583, 715 A.2d 1018 (1998).*

DISPOSITION:
Judgment of the Appellate Division affirmed.

COUNSEL:
Vincent J. D'Elia argued the cause for appellants.

Glenn R. Jones, Deputy Attorney General, argued the cause for respondents (John J. Farmer, Jr., Attorney General of New Jersey, attorney; Andrea M. Silkowitz, Assistant Attorney [***9] General, of counsel, Bertram P. Goltz, Jr., Deputy Attorney General, on the brief).

JUDGES:
The opinion of the Court was delivered by COLEMAN, J. JUSTICES O'HERN and STEIN join in the entirety of JUSTICE COLEMAN's opinion. CHIEF JUSTICE PORITZ and JUSTICES GARIBALDI, LONG, and VERNIERO join in Sections I, II, VI, and VII of JUSTICE COLEMAN's opinion. CHIEF JUSTICE PORITZ and JUSTICES GARIBALDI and LONG join in Section II of JUSTICE VERNIERO's separate opinion, which deals with Simonini's qualified immunity.

OPINIONBY:
COLEMAN

OPINION:

[*345]

[340]** The opinion of the Court was delivered by

COLEMAN, J.

This appeal involves a claim for a constitutional violation brought under *42 U.S.C.A. § 1983* (Section 1983). We are asked

primarily to decide whether sufficient probable cause existed to arrest Frank Schneider, Jr. (plaintiff) and, if not, whether defendants otherwise are entitled to qualified immunity. We must also revisit our summary judgment standard explicated in *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 666 A.2d 146 (1995)*, and adjudge whether the trial court or the jury should decide certain factual and legal disputes in Section 1983 cases. We hold [***10] that probable cause did not exist to arrest plaintiff. A majority of the Court however, holds that even in the absence of probable cause defendant Simonini is entitled to qualified immunity because he could reasonably have believed in its existence. We also hold that defendant Buccino is not liable as a supervisor under the standard adopted today. Accordingly, the judgment of the Appellate Division is affirmed.

[**341] I.

Although the facts are, for the most part, undisputed, different inferences may be drawn from those facts. In October 1988, the Organized Crime Bureau of the New Jersey Division of Criminal Justice (DCJ) began Operation LeJeune, a ten-month investigation into the Bruno/Scarfo organized crime family. Defendant Donald Simonini, the lead investigator, and defendant Robert [*346] Buccino, commander of the Organized Crime Bureau of the DCJ, were two key members of Operation LeJeune.

From the beginning of the investigation, Simonini was assisted by a confidential informant named Anthony Bonura, who aided the investigation by providing inside information. Bonura's identity remained confidential throughout most of the investigation. The name Frank Schneider first surfaced after a tape [***11] recorded conversation on April 19, 1989 between Bonura and Richard Discorfano, an Operation LeJeune target, which revealed that two men, Frank Schneider and Mark Vilardi, were involved in hijacking a truckload of VCRs. The recorded conversation revealed, in pertinent part:

Bonura: ... what about the big load, VCRs, shit like that.

Discorfano: That ain't them, that ain't them. Those guys are going into hijacking. Remember, I told you I hired a couple of guys to hijack. Those guys, they don't know what they're doing. They handcuffed a guy in South Jersey, they're bring'em up here, the guys get out of the fuckin' truck, he's knocking on people's fuckin' door.

Bonura: Who stuck them up?

Discorfano: They did.

Bonura: Smokey and a ...

Discorfano: No. No. Frankie.

Bonura: Frankie Schneider?

Discorfano: Not the father, the son.

Bonura: The son. Yea.

Discorfano: Well. Mark right now is involved with the walkie talkie; Frank Schneider does the shit. Know what I'm saying?

Bonura told Simonini that he did not know Frank Schneider, Jr. Thereafter, on July 10, 1989, Simonini was informed by FBI Special Agent Robert DeBellis that a Mark Vilardi and a Frank Schneider, Jr., had committed **[***12]** an armed hijacking of a truckload of VCRs on the New Jersey Turnpike for Richard Discorfano. According to Simonini, DeBellis told him that the hijackers abandoned the truck and its cargo and left the truck driver, Cliff Glidden, bound in the sleeper section of the truck after they struck a telephone pole in northern New Jersey. DeBellis also gave Simonini a description of Schneider relayed to him by his informant: **[*347]** a "big kid" between six and six feet two inches tall with a large muscular build and in his twenties. He told Simonini that Schneider and his father had criminal records and that the son lived in the Garfield-Lodi area. Simonini testified that, although DeBellis told him that there was a Frank Schneider, Sr., he was never told that Frank Schneider, Sr. had a criminal record. That is the only disputed relevant fact

in the record. Finally, Simonini was told that Vilardi had an arrest record and lived in Paterson.

DeBellis mentioned to Simonini that the FBI had verified some of the informant's information by checking police reports. The reports confirmed that two men hijacked a truckload of VCRs on the New Jersey Turnpike on December 27, 1988, and that they bound the driver [***13] with tape, threw him in the sleeper portion of the truck, and abandoned the truck and its cargo in Hackensack.

Based on that information, Simonini began his search to find Schneider and Vilardi. Simonini inquired whether DeBellis's informant could identify Schneider or Vilardi, or whether there were any photographs Simonini could use to assist in his search for the hijackers. DeBellis told [**342] Simonini that neither he nor his informant could provide additional assistance, but that his informant had proven to be reliable in the past.

Simonini obtained access to the police reports on the hijacking and learned that no fingerprints were found at the scene. The truck driver, Glidden, gave a general description of one of the hijackers, whom he described as a "very strong" Hispanic male, twenty-five or thirty years old, about five feet eleven inches tall with dark hair, wearing a plaid coat, blue jeans and sunglasses. Subsequent to plaintiff's arrest, Glidden picked out the real hijacker from a photo line-up in August 1990. However, Simonini was unable to contact Glidden during the investigation.

Simonini accessed the Division of Motor Vehicles' (DMV) computerized records for "Frank Schneider" [***14] and found several individuals with that name. Based on information he received from DeBellis and Glidden, he narrowed the field down to four "Frank Schneiders." Two of those men were ruled out as suspects. The [*348] first Frank Schneider, who had a Montville address and was born in 1944, was eliminated because he was too old to fit the description given by Glidden and DeBellis's informant. The second Frank Schneider, who lived in Lincoln Park and was born in July 1964, was eliminated because his

listed height, five feet eight inches, did not fit the "big kid" description given by DeBellis's informant. The other two men were a Frank J. Schneider who lived at 10 Charles Court in Lodi with a listed birth date of "August 00, 1961" and an eye color of brown, and a Frank J. Schneider, Jr., who lived at 270 Walter Avenue in Hasbrouck Heights with a listed birth date of August 2, 1961, and an eye color of hazel. Based on the similarities between the remaining two men, Simonini concluded that the two men were in fact the same person. He testified that, in his experience, many people involved in criminal activities have more than one driver's license with slightly different personal information. [***15]

Simonini then ran the name Frank Schneider and the birth date August 2, 1961, through the State Police Master Index. He obtained a report stating that that particular Frank Schneider, plaintiff, was six feet three inches tall and weighed about 150 pounds. The reports also reflected arrests for burglary, property damage, invasion of privacy, and disturbing the peace. Simonini believed those arrests corroborated the information from DeBellis's informant that Frank Schneider, the suspected hijacker, had a criminal record. After reviewing that information, Simonini contacted DeBellis again to determine whether he had any additional identifying characteristics for Frank Schneider; DeBellis told him he did not. Simonini testified that he did not obtain photographs or make any inquiries about Frank Schneider at the police station or at any other law enforcement agency or correctional facilities in his criminal history report because he did not want to jeopardize the investigation or endanger Bonura, and because there was no one to whom he could show the photographs. Simonini did not investigate whether the suspect's father had a criminal record. At that point, Simonini concluded his investigation. [***16]

[*349] Operation LeJeune was terminated on July 17, 1989, when information was received about an imminent residential armed robbery. The day before, Simonini reviewed the evidence he had against Vilardi and plaintiff with his legal staff who concluded that probable cause existed to make the arrests.

Simonini then added plaintiff's and Vilardi's names to his 138-page affidavit, which sought arrest and search warrants for thirteen suspected criminals who were targets of Operation LeJeune. With regard to Schneider, Simonini's affidavit described the conversation recorded by Bonura, the information concerning the hijacking related by DeBellis's confidential informant, and the corroboration of the informant's information through investigative police reports and information from Glidden, the driver of the [**343] hijacked truck. Simonini did not include in the affidavit, however, Schneider's physical description, address or age. Based on the content of the affidavit that related to the hijacking, which comprised three pages in an otherwise 138-page affidavit, a Superior Court judge issued separate arrest warrants on July 14, 1989 for Schneider and Vilardi. Warrants were also issued for the other thirteen [***17] suspects.

Plaintiff and other Operation LeJeune targets were arrested on July 17, 1989. Plaintiff was arrested at his job by John Post, an investigator with the DCJ Organized Crime Bureau, despite his protests that he was the wrong man. Post had been told that the suspect had different driver's licenses and different addresses, but he was not advised of any uncertainty regarding his identity. Post called Buccino to inform him that plaintiff had been arrested and that plaintiff was forcefully and repeatedly claiming that a mistake had been made. Buccino instructed Post to transport plaintiff to the West Orange Armory and cover his head to avoid any media exposure.

Upon his arrival at the West Orange Armory, plaintiff was taken to the processing room where the other Operation LeJeune targets were being held. According to plaintiff, Buccino asked him whether he remembered him from the arrest of his father [*350] from the week before. Plaintiff responded, "What are you talking about, my father has never gotten a parking ticket before." Mark Vilardi, the other suspected hijacker, was in the room and informed the police that plaintiff was not the right man. Plaintiff eventually removed a picture [***18] of his father from his wallet and gave it to Buccino to check, at which point

Buccino left the room. When another officer, Edward Ronald Donahue, confirmed that the man in the picture was not Frank Schneider, Sr., plaintiff was released and driven back to work.

On August 3, 1989, the Frank Schneider, Jr. who was involved in the hijacking turned himself in to authorities. He lived near Montville. After checking the police records at the Montville Police Department, investigators learned that the Frank Schneider, Jr. they had been seeking had addresses in Montville and Lincoln Park, was five feet ten inches tall, and weighed 200 pounds. As it turned out, this Frank Schneider, Jr. was the man Simonini had found in the DMV's records with the Lincoln Park address and the July 1964 birth date.

Plaintiffs Frank Schneider, Jr. and his wife, Susan Schneider, filed this Section 1983 action against Simonini, Buccino, and Post, as well as other law enforcement officials and agencies, based on the wrongful arrest and detainment of Frank Schneider, Jr. The trial court granted summary judgment to all defendants except Simonini, Post, and Buccino. As to them, the trial court found that there were [***19] genuine issues of material fact concerning the existence of probable cause for plaintiff's arrest.

A jury trial was held during which several officers and an expert on police procedures testified. They indicated that the investigation into the identity of Frank Schneider, Jr. was not thorough and did not conform to standard police procedures. The expert conceded, however, that the existence of information that would tend to point away from a particular person does not independently demonstrate that the investigative officer acted improperly.

[*351] During the trial, Buccino described his role in Operation LeJeune. He stated that his "function [was] to give [his staff] what they needed to get the job done." Buccino spoke specifically about Simonini. He stated:

In the case of Don Simonini, I wouldn't ask the question do you have probable cause. There is an attorney sitting right along side of him. If Don Simonini had one-year experience as a law

enforcement officer, yes, I would, I would go up to him and say, sure, let's go over your probable cause because that would [**344] be my job. ... With the people that I have in the organized crime [agency] they're all experienced, well-trained, [***20] I don't ask those questions. ...

At the close of all the evidence, both sides moved for judgment on liability pursuant to Rule 4:40-1. The trial court directed a verdict on liability in favor of plaintiff. In finding that defendants lacked probable case, the trial court stated:

There was not a shred of evidence to tie [plaintiff] to the hijacking. And a little bit more scrutiny by the agents of the State would have assisted them in concluding that. They had no physical observations. They had no weapon. They had no physical evidence of a robbery. They had nobody who could identify this plaintiff. Nothing that DeBellis said ... should have led them to this plaintiff without more inquiry. [They] did not inquire as to whether the plaintiff's father had a criminal record. [They] made but a cursory examination as to where this plaintiff lived. They did not inquire or they didn't care if there was any person anywhere who could identify what this Frank Schneider looked like.

Mr. Simonini, indeed, made the conclusion that this was his man after he pulled up the DMV check and concluded that merely because this fellow had two addresses, one of which was in Lodi and the other [***21] which was in Hasbrouck Heights without knowing more, without knowing at this point whether his father had committed a crime, at that point he concluded that this was his man.

After determining that defendants lacked probable cause, the trial court dismissed the case against Post based on qualified immunity. Buccino and Simonini, however, were not so fortunate. In determining that Simonini was not entitled to qualified immunity, the court stated:

He relied on confidential informants who were untested. He relied on confidential informants as to whom he had no personal knowledge. He had no physical evidence. He had no photograph. He had a variety of names and he centered on the two that were most convenient to him. He did not inquire into the status of the father even though one of the informants on whom he relied said the father had a criminal record.

[*352] With respect to Buccino, the trial court stated that it was "a little bit more problematic[,] but the end result is the same." The court stated:

[Buccino] manifested a deliberate indifference here by failing to ask "What is the probable cause to bring these guys in? I never heard of this name before two days ago. Can anybody [***22] identify him? Why are you sending ... an arrest team out with two address? How do we know which address is the right one?"

These are the type of questions that should be asked about.

In sum, the trial court concluded that Simonini and Buccino "demonstrated a deliberate indifference as to the existence of probable cause and [as to] the true identity of the person Frank Schneider that they were seeking." Thus, the trial court denied Simonini's and Buccino's motions for judgment and granted judgment for liability in favor of plaintiffs.

The court submitted the issue of damages to the jury. The jury awarded plaintiffs damages of $ 60,000 against Simonini and $ 15,000 against Buccino. Plaintiffs were awarded counsel fees of $ 301,944 to be paid by defendants. Defendants' post-trial motions for judgment notwithstanding the verdict, and for a new trial or a remittitur, were denied. Plaintiff committed suicide three days after the post-trial motions had been denied. n1

n1 We express no opinion regarding whether the complaint should be amended pursuant to Rule 4:34-1(b) to substitute an executor or administrator.

[***23]

Defendants appealed, arguing essentially that they were entitled to qualified immunity [**345] because there was probable cause, or, at the very least, a reasonable officer would have concluded that probable cause existed. The Appellate Division reversed the judgment in favor of plaintiffs, concluding that defendants were entitled to qualified immunity. *Schneider v. Simonini, 314 N.J. Super. 583, 596, 715 A.2d 1018 (1998).* It was of the view that "[a] law officer is entitled to judgment as a matter of law if he or she acted with probable cause or, if probable cause is lacking, that under the known circumstances a reasonable police officer could have believed that probable cause existed." *Id. at 593* (citing *Kirk v. City of Newark, 109 N.J. 173, 184, 536 A.2d 229 (1988)).*

[*353] The Appellate Division reasoned that although Simonini could have conducted a more detailed investigation, "there was at least arguable probable cause and ... Simonini was therefore entitled to qualified immunity for his conduct." *Schneider, 314 N.J. Super. at 595.* With regard to Buccino, the Appellate Division stated that "the rationale for qualified immunity is stronger since he committed no acts leading to plaintiff's arrest." [***24] Ibid. Relying on federal case law, the panel explained that "to affix liability to a supervisor there must be a showing that he had actual or constructive knowledge of the misconduct and that his failure to take action had [a] causal connection to the constitutional violation." Ibid. In addition, the panel extrapolated that since it had found no constitutional violation by Simonini, it could not find a constitutional violation with regard to Buccino. *Schneider, 314 N.J. Super. at 596.* We granted plaintiffs' petition for certification. *158 N.J. 685, 731 A.2d 45 (1999).*

II.

A.

Plaintiff's claim arises under *42 U.S.C.A. § 1983*, which provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[*42 U.S.C.A. § 1983*].

Essentially, Section 1983 provides a cause of action [***25] for a person who has been deprived of his or her well-established federal constitutional or statutory rights by any person acting under the color of state law. *Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923, 64 L. Ed. 2d 572, 577 (1980)*; Kirk, supra, 109 N.J. at 185. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person [*354] would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)*. The objective reasonable person standard for Section 1983 cases, however, does not impose liability "for violations of duties of care arising out of tort law." *Baker v. McCollan, 443 U.S. 137, 146, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433 (1979)*.

The standard we apply today to determine whether a police officer has immunity in Section 1983 cases has evolved over the years. A police officer alleged to have violated an arrestee's well-established constitutional or statutory rights may be exonerated [***26] from civil liability by invoking the doctrine of qualified immunity. Qualified immunity is an affirmative defense that the defendant must establish. Gomez, supra, 446 U.S. at 640-41, *100 S. Ct. at 1923-24*. "Qualified immunity is also referred to as

executive or good faith immunity." Henk J. Brands, Note, Qualified Immunity and The Allocation of Decision-Making Functions [**346] Between Judge and Jury, *90 Colum. L. Rev. 1045, 1045 n.1 (1990)* (Brands, Qualified Immunity).

One of the elements of qualified immunity, originally established in *Wood v. Strickland, 420 U.S. 308, 322, 95 S. Ct. 992, 1000-01, 43 L. Ed. 2d 214 (1975)*, required a showing of the absence of malice. That standard was modified seven years later to remove the malice element. Harlow, supra, 457 U.S. at 815-19, *102 S. Ct. at 2736-38.* The standard for qualified immunity established in Harlow is whether an executive official, such as a police officer, violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, [***27] supra, 457 U.S. at 818, *102 S. Ct. at 2738, 73 L. Ed. 2d at 410.* If the official did not violate clearly established constitutional or statutory law, he or she would have immunity. But if the official violated "clearly established law," the focus then shifts to a consideration of "extraordinary circumstances" that require the official to "prove that he [or she] neither knew nor should have known of the relevant legal standard." Harlow, supra, 457 U.S. at 819, *102 S. Ct. at 2738.* The [*355] "clearly established law" requirement has a temporal component that obligates a court to judge an official's conduct based on the state of the law and facts that existed at the time of the alleged statutory or constitutional violation. *Anderson v. Creighton, 483 U.S. 635, 639, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987).*

The Court in Anderson further redefined the standard for determining whether qualified immunity exists as "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the arrestee's] warrantless search to be lawful, in light of clearly established [***28] law and the information the searching officers possessed. [The searching or arresting officers'] subjective beliefs about the search are irrelevant." Anderson, supra, 483 U.S. at 641, *107 S. Ct. at 3040.* Essentially, "determining whether a [police officer] is entitled to qualified immunity 'requires a two-part inquiry: (1) was the law governing

the [police officer's] conduct clearly established? (2) Under that law could a reasonable [police officer] believe his conduct lawful?" *Liston v. County of Riverside, 120 F.3d 965, 975 (9th Cir. 1997)* (citation omitted).

One year after Anderson was decided, this Court rearticulated the Harlow standard for determining whether a police officer will be immune from liability in Section 1983 cases. A police officer being sued for violating a clearly established constitutional or statutory provision is entitled to judgment if the police officer can successfully prove: (1) that he or she acted with probable cause; or, (2) "even if probable cause did not exist, that a reasonable police officer could have believed in its existence." Kirk, supra, 109 N.J. at 184. **[***29]** The critical issue in this case is whether defendants are immune from liability under the Kirk standard for not properly identifying hijacker Frank Schneider, Jr.

B.

Although procedurally, qualified immunity is deemed to be an affirmative defense to alleged constitutional or statutory **[*356]** violations in Section 1983 actions, resolution of immunity issues should occur "at the earliest possible stage in litigation." *Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589 (1991); Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985).* The Court in Hunter observed that it was improper to routinely submit the issue of immunity to a jury. "Immunity ordinarily should be decided by the court long before trial." Hunter, supra, 502 U.S. at 228, *112 S. Ct. at 537.* To advance the announced policy of early disposition of the qualified immunity defense before trial, we **[**347]** reaffirm our belief that the summary judgment standard should be used. See Mitchell, supra, 472 U.S. at 526, *105 S. Ct. at 2815* **[***30]** (indicating that defendant should be entitled to summary judgment before discovery if the law was not clearly established).

Notwithstanding this Court's conclusion that qualified immunity should be "presented for determination on motions for

summary judgment," Kirk, supra, 109 N.J. at 184, we have never expressly held whether the judge or jury should decide disputed facts that are relevant to the immunity issues. Kirk decided the immunity issue as a matter of law. *Kirk, 109 N.J. at 187.* The alleged constitutional transgression in the present case is that the Fourth Amendment was violated because plaintiff was arrested without probable cause to believe that he was one of the hijackers. In the traditional criminal law context, trial judges sit as both the factfinder and the arbiter of the law when deciding suppression motions (see Rule 3:5-7) under the Fourth Amendment. Kirk, supra, 109 N.J. at 186.

One commentator has framed the questions in this way: "If there is a genuine dispute as to what actually happened, may the trial judge resolve these factual disputes? ... If the judge has not granted summary judgment, in what fashion, if at all, should [***31] he submit the qualified immunity inquiry to the jury?" Brands, Qualified Immunity, *90 Colum. L. Rev. at 1051.*

When addressing the question whether the judge or jury should decide disputed facts essential to a determination of qualified [*357] immunity, the Court in Kirk properly concluded that we should look to federal law. Kirk, supra, 109 N.J. at 186. Indeed, the Supreme Court in Hunter, decided three years after Kirk, stated that immunity should ordinarily be decided by the court, not the jury, and that determination should be made long before trial. Hunter, supra, 502 U.S. at 228, *112 S. Ct. at 536-537.* We must answer today what Kirk did not decide: how to resolve the qualified immunity issues when facts that are essential to those determinations are disputed. The ebb and flow of federal qualified immunity jurisprudence since Hunter has not been uniform.

The Supreme Court has never specifically addressed the question directly, and has, in fact, clouded the issue with its language in Hunter. There, the Court reversed the Ninth Circuit, which had held that "whether a reasonable officer could [***32] have believed he had probable cause is a question for the trier of fact." *Bryant v. United States Treasury Dep't, Secret Serv., 903 F.2d 717, 721 (9th Cir. 1990).* The Court determined that the

Ninth Circuit was incorrect because its holding "routinely places the question of immunity in the hands of the jury." Hunter, supra, 502 U.S. at 228, *112 S. Ct. at 537.* By further stating that "immunity ordinarily should be decided by the court long before trial," ibid., the Court evidenced an intention to remove from the jury the issue of qualified immunity. Clearly, the Court meant immunity to be a legal issue to be decided by the court. See Anderson, supra, 483 U.S. at 640 n.2, *107 S. Ct. at 3039 n.2;* Mitchell, supra, 472 U.S. at 526, *105 S. Ct. at 2815;* Harlow, supra, 457 U.S. at 818, *102 S. Ct. at 2738.*

The problem is that the Court did not specify what it meant by "ordinarily." What is non-ordinary and how should those non-ordinary cases be decided? With little guidance [***33] from the Supreme Court in this area, determining who decides the issue of qualified immunity at trial when there are disputed facts has resulted in inconsistent decisions by federal courts.

[*358] A majority, although not an overwhelming majority, of federal circuits have held that, when deciding a motion for summary judgment where there are disputed [**348] material facts, a jury should resolve those disputed facts, but the ultimate question of objective reasonableness should be determined by the court. The following decisions (grouped together by circuit) have interpreted Hunter as requiring the trial court to make the objective reasonableness determination: *Swain v. Spinney, 117 F.3d 1, 10 (1st Cir. 1997); Tierney v. Davidson, 133 F.3d 189, 194 (2d Cir. 1998); Warren v. Dwyer, 906 F.2d 70, 74-75* (2d Cir.), cert. denied, *498 U.S. 967, 111 S. Ct. 431, 112 L. Ed. 2d 414 (1990); Rogers v. Powell, 120 F.3d 446, 454 (3rd Cir. 1997); Sharrar v. Felsing, 128 F.3d 810, 828 (3rd Cir. 1997); Karnes v. Skrutski, 62 F.3d 485, 491 (3rd Cir. 1995); Buonocore v. Harris, 65 F.3d 347, 359-60 (4th Cir. 1995);* [***34] *Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993); Williams v. Pollard, 44 F.3d 433, 435 (6th Cir. 1995); Engle v. Townsley, 49 F.3d 1321, 1323 (8th Cir. 1995);* and *Cottrell v. Caldwell, 85 F.3d 1480, 1487-88 (11th Cir. 1996).*

Other courts have reached different conclusions and have held that, if the existence of disputed facts prevents the issue of

qualified immunity from being decided on summary judgment, those disputed facts, along with the question of objective reasonableness, should be submitted to the jury, just like any other mixed question of law and fact. See *Oliveira v. Mayer, 23 F.3d 642, 649 (2d Cir. 1994); Hamrick v. City of Eustace, 732 F. Supp. 1390, 1395 (E.D. Tex. 1990).* One reason given is that "immunity's shield against suit is lost, of course, when police officer defendants go to trial. At that point, if - and this is a big if - there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question." *Presley v. City of Benbrook, 4 F.3d 405, 410 (5th Cir. 1993);* see also *Sloman v. Tadlock, 21 F.3d 1462, 1468 (9th Cir. 1994)* [***35] (stating a jury, properly instructed, can decide reasonableness of officer's conduct in light of factual context in which it takes place).

[*359] We agree with the District Court of Wyoming in its analysis of the dilemma created by the language in Hunter:

It appears that the way to reconcile these seemingly conflicting mandates is to understand that although a genuine issue of material fact precludes the entry of qualified immunity prior to trial, it does not prevent the defendant from reasserting the defense at trial. In other words, while a factual issue defeats the "immunity from suit" component of the qualified immunity, the defendant will still retain the right to renew this motion at trial in an effort to avail himself of the "immunity from liability" component of the defense.

....This Court can infer the proper method for raising this defense during subsequent proceedings. First, the defendant bears the burden of establishing that his actions were reasonable, by a preponderance of the evidence, because qualified immunity is an affirmative defense under Harlow .... Second, while the ultimate issue of whether the defendant is entitled to qualified immunity is a legal [***36] question, it appears that the underlying factual question as to the reasonableness component is a question for the trier of fact - since there was a genuine issue of material fact relating to this question in the first place. Thus, in order to reassert this claim "at" trial, the Court would submit

an interrogatory to the jury so that it may resolve this factual issue. The Court can then determine the legal issue of qualified immunity based on the jury's answer to this interrogatory.

[*Gardetto v. Mason, 854 F. Supp. 1520, 1530-1532 (D. Wyo. 1994)* (internal citations omitted).]

Because the Supreme Court has explicitly stated that qualified immunity is a legal issue and has suggested that it be decided by the court, and because a majority of federal circuit courts, both before [**349] and after Hunter, have held that qualified immunity is to be decided by the court, we hold that the issue of qualified immunity is to be determined by the trial judge. That means the judge must decide whether probable cause existed, and if not, whether the executive official could reasonably have believed in its existence. Where historical or foundational facts that are critical to those [***37] determinations are disputed, the jury should decide those disputed facts on special interrogatories. The jury's role "should be restricted to the who-what-when-where-why type of historical fact issues." Cottrell, supra, 85 F.3d at 1488. Based on the jury's factual findings, the trial judge must then make the legal determination of whether qualified immunity exists.

[*360] In the present case there was at least one disputed fact regarding immunity: whether Special Agent DeBellis informed Simonini that hijacker Frank Schneider, Jr.'s father had a criminal record. The trial judge, not the jury, resolved that issue against defendants. Under our analysis, that was harmless error.

The parties made cross-motions for judgment in their favor on the immunity issue at the close of all the evidence. See R. 4:40-1. Analytically, the standard for determining summary judgment motions is similar to that required for an involuntary dismissal under Rule 4:37-2(b), and also applies when deciding motions under Rule 4:40-1 and Rule 4:40-2. Brill, supra, 142 N.J. at 535. When a search or seizure, or both, occur pursuant to a warrant, the existence of probable cause is presumed to have

existed [***38] for purposes of a Section 1983 cause of action based on an alleged Fourth Amendment violation. A plaintiff seeking recovery must then prove by a preponderance of the evidence that probable cause did not exist. If probable cause is found to have existed, then judgment should be entered for the law enforcement official as a matter of law. If probable cause did not exist, however, the trial court must then decide whether a reasonable police official could have believed in its existence.

To recapitulate, we hold that in Section 1983 cases when disputed historical facts are relevant to either probable cause or the existence of a reasonable, but mistaken, belief concerning its existence, the trial court must submit the disputed factual issue to the jury in the form of special interrogatories for resolution by the jury. After receipt of the jury's answers, the trial judge must then decide the legal issue of whether probable cause existed and, if not, whether a reasonable police official could have believed in its existence. Regarding the reasonableness of the belief, in the absence of probable cause, the judge must decide whether the defendant has proven by a preponderance of the evidence [***39] that his or her actions were reasonable under the particular facts. That means the traditional Brill summary judgment procedure is being modified to accommodate the special needs of [*361] Section 1983 cases in order to comply with federal decisional law. Such a modification, however, does not affect the parties' right to trial by jury. "A jury resolves factual not legal, disputes. ... Thus, the right of trial by jury remains inviolate." Brill, supra, 142 N.J. at 537.

III.

Next, we focus on whether the meaning of probable cause was clearly established law on July 17, 1989 when plaintiff was arrested, and whether or not the question of the existence of probable cause to arrest plaintiff was properly decided by the trial judge. *Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949),* defined probable cause as follows: "Probable cause exists where 'the facts and circumstances within ... [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant

a man of reasonable caution in the belief that' an offense has been or is being committed." [**350] *Brinegar, 338 U.S. at 175-76, 69 S. Ct. at 1310-11* [***40] (quoting *Carroll v. United States, 267 U.S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543 (1925))*. When determining whether probable cause exists, courts must consider the totality of the circumstances, and they must deal with probabilities. *Illinois v. Gates, 462 U.S. 213, 230-31, 238, 103 S. Ct. 2317, 2328, 2332, 76 L. Ed. 2d 527 (1983);* see also *State v. Novembrino, 105 N.J. 95, 122, 519 A.2d 820 (1987)* (adopting totality- of-the-circumstances test). That standard is required because probable cause is a "fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." Gates, supra, 462 U.S. at 232, *103 S. Ct. at 2329;* see also Brinegar, supra, 338 U.S. at 176, *69 S. Ct. at 1311* (stating that probable cause is a "practical, nontechnical conception"). It is "something less than proof needed to convict and something more than a raw, unsupported suspicion." *State v. Davis, 50 N.J. 16, 23, 231 A.2d 793 (1967),* cert. [***41] denied, *389 U.S. 1054, 88 S. Ct. 805, 19 L. Ed. 2d 852* [*362] *(1968).* Probable cause is a suspicion or belief that is well-grounded in facts. *Davis, 50 N.J. at 23-24.*

This Court has stated that the question whether or not probable cause exists "involves no more than a value judgment upon a factual complex rather than an evident application of a precise rule of law, and indeed a value judgment which inevitably reflects the seasoning and experience of the one who judges." *State v. Funicello, 60 N.J. 60, 72-73, 286 A.2d 55* (Weintraub, C.J., concurring), cert. denied, *408 U.S. 942, 92 S. Ct. 2849, 33 L. Ed. 2d 766 (1972).*

Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

[Brinegar, supra, 338 U.S. at 176, *69 S. Ct. at 1311.]*

"The common and specialized experience and work-a-day knowledge of police [officers] must be taken into account. [***42] " *State v. Contursi, 44 N.J. 422, 431, 209 A.2d 829 (1965).* Based on a long line of state and federal cases, we have concluded that "under both the United States and the New Jersey Constitutions, the law of probable cause was clearly established" by January 1981. Kirk, supra, 109 N.J. at 186.

The fact that the Operation LeJeune investigation team may have obtained legal advice from a deputy attorney general concerning the existence of probable cause before applying for the arrest warrant is not dispositive of whether probable cause existed. The same is true where a judge reviews a law enforcement official's affidavit and then issues a warrant. In both instances, the officer cannot escape his or her non-delegable responsibility to make an independent assessment of whether his or her affidavit establishes probable cause. *Malley v. Briggs, 475 U.S. 335, 345, 106 S. Ct. 1092, 1098, 89 L. Ed. 2d 271 (1986).*

It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a [judge], working under docket pressures, [***43] will fail to perform as a [judge] should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

[*363] [*Malley, 475 U.S. at 345-46, 106 S. Ct. at 1098.]*

Furthermore, as the Supreme Court stated in *United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984),* the good faith inquiry of the officer "is confined to the objectively ascertainable question whether a reasonably well [**351] trained officer would have known that the [arrest] was illegal despite the [judge's] authorization." *Id. at 922 n.23, 104 S. Ct. at 3420 n.23.*

The affidavit executed by Simonini sought warrants for Frank Schneider, Jr. and fourteen other persons. The affidavit contained a detailed description of the facts to support probable cause to believe that numerous criminal offenses had been or were being committed. The affidavit described with particularity all of the businesses, motor vehicles, and private residences to be searched, except with respect to Frankie Schneider, Jr. Neither the affidavit nor the warrant [***44] listed his place of residence, his place of employment, or his date of birth. The only descriptive information in the warrant was the name "Frank Schneider, Jr." and a description of the hijacking, but not the hijackers. Simonini testified that he did not recall if he told the judge who issued the warrant anything beyond what he stated in the affidavit. Even if he did, nothing has been presented as a supplement to his affidavit as required by Rule 3:5-3(a).

Although the affidavit clearly stated that a criminal hijacking and other offenses had been committed by "Mark Joseph Valardi and Frank Schneider, Jr.," neither the affidavit nor the warrant contained any information identifying plaintiff as one of the hijackers. Probable cause requires a showing that both a crime has been, or is being committed, and that the person sought to be arrested committed the offense. When a search or seizure is made pursuant to a warrant, the probable cause determination must be made based on the information contained within the four corners of the supporting affidavit, as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously. Novembrino, supra, 105 N.J. [***45] at 128; *State v.* [*364] *Howery, 80 N.J. 563, 567, 404 A.2d 632,* cert. denied, *444 U.S. 994, 100 S. Ct. 527, 62 L. Ed. 2d 424 (1979); State v. Fariello, 71 N.J. 552, 562-64, 366 A.2d 1313 (1976); State v. Meighan, 173 N.J. Super. 440, 448-49, 414 A.2d 576* (App. Div.), certif. denied, *85 N.J. 122, 425 A.2d 280 (1980).* Simonini's affidavit was not supplemented at the time the warrant was issued.

Facially, the affidavit and arrest warrant for hijacker Frank Schneider, Jr. contained no details identifying plaintiff as one of the hijackers. Moreover, the description that Simonini received

about the hijacker did not fit the description of plaintiff. DeBellis's informant described the hijacker as a "big kid" in his twenties with a criminal record and a muscular build who lived in the Garfield-Lodi area. Glidden, the driver of the hijacked truck, described hijacker Frank Schneider, Jr. as a very strong Hispanic male about 5'11" tall. However, the description Simonini obtained from the DMV records was of a Frank Schneider who was 6'3" and weighed only 150 lbs. Plaintiff, being "skinny as a rail," clearly did not match the description [***46] given by either DeBellis's informant or Glidden, both of whom described the culprit to be a big, strong man. Significantly, none of that information was incorporated into the affidavit or otherwise placed before the judge who issued the warrant. In addition, Simonini never verified Frank Schneider's identity with a photograph. No one ever made a positive identification of the plaintiff.

As we have stated in the past, probable cause is "something more than a raw, unsupported suspicion." *State v. Davis, 50 N.J. 16, 23, 231 A.2d 793 (1967)*, cert. denied, *389 U.S. 1054, 88 S. Ct. 805, 19 L. Ed. 2d 852 (1968)*. Law enforcement officials are required to conduct corroborative investigations when an informant's information is lacking in essential detail. *State v. Smith, 155 N.J. 83, 95-96, 713 A.2d 1033 (1998)*. The lack of detail in this affidavit and warrant militates against the existence of probable cause because it prevented the judge who issued the warrant from fulfilling his obligation to make an independent determination of [*365] whether plaintiff was the [**352] likely hijacker. *Dumbra v. United States, 268 U.S. 435, 441, 45 S. Ct. 546, 548-49, 69 L. Ed. 1032, 1036 (1925)*; [***47] Novembrino, supra, 105 N.J. at 128; *State v. Fariello, 71 N.J. 552, 553, 366 A.2d 1313 (1976)*. The judge was unable to make that determination because the affidavit did not contain any objectively reasonable basis for believing that plaintiff was one of the hijackers authorized by the warrant to be arrested.

Given that neither Simonini nor Buccino had ever seen the hijacker before plaintiff was arrested, they were not able to identify Schneider based on the content of the affidavit. The

name "Frankie Schneider, Jr." or "Frank Schneider, Jr." was the only description of plaintiff in the affidavit as one of the hijackers. The affidavit did not contain any other descriptive characteristics of plaintiff as the wanted hijacker. "Such a minimal description in this constitutional context is descriptive of nothing." *State v. Caldwell, 158 N.J. 452, 468, 730 A.2d 352 (1999)* (Handler, J., concurring). That critical deficiency in the affidavit, as a matter of law, prevented it from passing constitutional muster in that it "did not provide the issuing judge with sufficient facts on which to base an independent determination as to the existence of probable [***48] cause" to believe plaintiff was one of the hijackers. Novembrino, supra, 105 N.J. at 128. Although affidavits need not be teeming with detail, the affidavit here did not satisfy the Fourth Amendment's particularity requirement. See *Maryland v. Garrison, 480 U.S. 79, 91, 107 S. Ct. 1013, 1020, 94 L. Ed. 2d 72 (1987); Henry v. United States, 361 U.S. 98, 100-01, 80 S. Ct. 168, 170-71, 4 L. Ed. 2d 134 (1959).* Consequently, the trial court was able to decide, as a matter of law, that probable cause did not exist to arrest plaintiff.

IV.

Having found that probable cause did not exist to arrest plaintiff, we must now determine whether, under the circumstances, a reasonable police officer could have believed that probable cause existed. That is a standard of objective reasonableness, which is a lesser standard than required for probable cause. Kirk, supra, [*366] 109 N.J. at 184. The only time that standard is not satisfied is when, "on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. ..." Malley, supra, 475 U.S. at 341, *106 S. Ct. at 1096.* [***49] Unlike the majority, post at (slip op. at 7-16), three members of the Court are persuaded that that standard was not satisfied in this case and defendant Simonini, as a matter of law, is not entitled to qualified immunity.

The question whether Simonini, under an objective standard, reasonably, though mistakenly, relied on the existence of probable cause is intertwined with the probable cause issue. Both require application of the objective reasonableness standard of the Fourth Amendment without regard to the law enforcement officer's underlying motive or intent. Harlow, supra, 457 U.S. at 817, *102 S. Ct. at 2737, 73 L. Ed. 2d at 410; State v. Bruzzese, 94 N.J. 210, 219, 463 A.2d 320 (1983).* Stated differently, the question is whether Simonini, who obtained the warrant based on his objectively unreasonable affidavit that led to plaintiff's unconstitutional seizure, could nonetheless objectively and reasonably rely on the existence of probable cause. That sounds incongruous, and under the facts of this case, is incongruous.

Defendants make two allegations that they believe prove that it was objectively reasonable to rely on the existence [***50] of probable cause. Defendants first claim that they needed to act quickly due to an impending robbery, and second, they feared jeopardizing the investigation if other law enforcement agencies were contacted to get more information on Frank Schneider, Jr.'s father. Both allegations have no bearing on the question of objective reasonableness; instead, they relate to [**353] the officer's absence of bad faith, which has not been a factor bearing on immunity since Harlow was decided in 1982. Nonetheless, defendants also claim that the impending residential robbery and the fear of compromising the investigation excused further inquiry concerning Schneider's identity. That defense essentially raises the question whether exigent [*367] circumstances existed, and as framed by the Hunter Court, "whether the [law enforcement officials] acted reasonably under settled law in the circumstances." Hunter, supra, 502 U.S. at 228, *112 S. Ct. at 537, 116 L. Ed. 2d 589.*

We are satisfied that exigent circumstances under the Fourth Amendment were clearly established law at the time of plaintiff's arrest, and none existed that were sufficient to satisfy the reasonableness standard. Sharrar, [***51] supra, 128 F.3d at 829. The concept of exigent circumstances is used to excuse the failure to obtain a written warrant, rather than excuse the

probable cause requirement essential to support issuance of a warrant. R. 3:5- 3(b). *Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S. Ct. 2091, 2099, 80 L. Ed. 2d 732, 745 (1984); United States v. Place, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641, 77 L. Ed. 2d 110 (1983); Payton v. New York, 445 U.S. 573, 588-89, 100 S. Ct. 1371, 1381, 63 L. Ed. 2d 639 (1980); McDonald v. United States, 335 U.S. 451, 455-56, 69 S. Ct. 191, 192-93, 93 L. Ed. 153 (1948); State v. Bolte, 115 N.J. 579, 597-98, 560 A.2d 644,* cert. denied, *493 U.S. 936, 110 S. Ct. 330, 107 L. Ed. 2d 320 (1989).* Simonini's judgment concerning when to close the trap on the hijackers is not relevant to the reasonableness of his belief in the existence of probable cause.

Any competent police officer is aware of the grave consequences that flow from a misidentification of the wrong person as the perpetrator of an offense. *Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968).* **[***52]** Once the DMV records revealed four entries under the name Frank Schneider who could have been one of the hijackers, any competent police officer would have proceeded with heightened caution to avoid a misidentification based solely on coincidental similarity of names. Viewed objectively, Simonini knew that in failing to tell the judge who issued the warrant any identifying information except plaintiff's name, there was a substantial probability of misidentification given the information in the DMV records.

Defendants' reliance on Kirk to support their claim that the circumstances made further investigation unnecessary is misplaced. **[*368]** In Kirk, Virginia Cardillo, a detective with the Youth Aid Bureau, was investigating the scalding of a three-year-old child. *109 N.J. at 176.* After reviewing the Division of Youth and Family Services (DYFS) file, Cardillo learned that the child lived with her mother and the plaintiff, and that the caseworker and the treating physician thought the burns were of "questionable origin." Ibid. The plaintiff met "with Cardillo, [who] waived his Miranda rights, and signed an exculpatory statement, in which he asserted that the scalding **[***53]** resulted from the breaking of a bathroom sink pipe." *Kirk, 109*

N.J. at 176-77. The plaintiff agreed to take a polygraph test, but because no operator was available, the test was postponed. *Kirk, 109 N.J. at 177.* When plaintiff failed to appear for the test, Cardillo spoke to an Essex County Assistant Prosecutor who told her that she had probable cause to seek the arrest of the plaintiff on aggravated assault charges. Ibid. Plaintiff was arrested. Ibid. Cardillo then requested a more detailed report from the treating physician who confirmed that the scalding was accidental in nature. Ibid. Soon after plaintiff was released, he filed a Section 1983 claim against Cardillo. Ibid.

The Court, in concluding that Cardillo was entitled to qualified immunity as a matter of law, emphasized the fact that Cardillo's investigation was "focused on the possibility of the scalding of a three-year-old child by a man living with the [**354] child's mother." *Kirk, 109 N.J. at 187.* Although the Court stated that an officer who reasonably believes she has probable cause need not exercise due diligence before effecting an arrest, it is clear that the potential for further child [***54] abuse was a substantial factor in the Court's decision.

Defendants ignore the standard we adopted in Kirk:

Thus the question becomes whether a reasonably well-trained officer in [the state law enforcement official's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest.

[*369] [Kirk, supra, 109 N.J. at 182 (emphasis added) (internal citation omitted)].

We agree with the appellate court of Tennessee that:

It is the duty of the person making an arrest to take precaution against arresting an innocent person, and this requires the making of such investigation as the circumstances permit. The

circumstances under which he must act should be such as any reasonable person acting without passion or prejudice, would have fairly suspected that the plaintiff committed the crime or was implicated in it.

[*Woods v. Harrell, 596 S.W.2d 92, 96 (Tenn. Ct. App. 1979)].

Here, it was premature to apply for a warrant [***55] to arrest plaintiff before pursuing further investigative tools to better ascertain the identity of Frank Schneider, Jr., the hijacker. "Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent." Malley, supra, 475 U.S. at 343-44, *106 S. Ct. at 1097, 89 L. Ed. 2d 271.* That is precisely what happened in the present case.

Although the issuance of the warrant may be sufficient to prevent Simonini's conduct toward plaintiff from equating with insolence in office, *State v. Kasabucki, 52 N.J. 110, 115, 244 A.2d 101 (1968),* an application for a warrant that "is so lacking in indicia of probable cause as to render official belief in its existence unreasonable ... will [lose] the shield of immunity." Malley, supra, 475 U.S. at 344-45, *106 S. Ct. at 1098, 89 L. Ed. 2d 271* (citation omitted). In the present case, the affidavit for the warrant and the warrant itself do not facially demonstrate probable cause to believe plaintiff was one of the two hijackers.

There was no objective or reliable evidence of a linkage between the plaintiff and the [***56] crime, except for the misfortune of having the same name as the real hijacker. No positive identification was made; nor was his identity even potentially confirmed through photographs. Simonini was essentially acting on a hunch. Viewing all the evidence in a light most favorable to defendants, we conclude, as a matter of law, there was no objective basis upon which a reasonably competent police officer would have believed that probable cause existed. We are therefore persuaded that any [*370] competent law enforcement official "would have known that his affidavit failed to establish probable cause [that plaintiff was one of the hijackers] and that he should not have applied for the warrant.

[Because] such was the case, [Simonini's] application for the warrant was not objectively reasonable because it created the unnecessary danger of an unlawful arrest." *Kirk supra, 109 N.J. at 182.* Hence, there is no qualified immunity for defendant Simonini.

V.

Next, we must decide whether Buccino incurred any liability based on his status as Simonini's street-level supervisor. Before addressing that issue, however, we [**355] must determine the appropriate standard for assessing street-level [***57] supervisory liability in Section 1983 cases. The United States Supreme Court has directly focused on this issue only once, in *Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976).* In a limited discussion of the issue, the Court observed that "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisors] - express or otherwise - showing their authorization or approval of such misconduct." *Id. at 371, 96 S. Ct. at 604, 46 L. Ed. 2d 561.* Although the plaintiff in that case established that at least some of the police officers on the streets had mistreated minority citizens in violation of the Constitution, the Court found that supervisory employees would not incur liability, even if a pattern of misconduct was established, unless the supervisors were causally linked to it. *Id. at 375, 96 S. Ct. at 606, 46 L. Ed. 2d 561.*

Two years after Rizzo, the Court decided *Monell v. Department of Soc. Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978),* which addressed the scope of municipal liability [***58] in Section 1983 cases. It held that Section 1983 does not impose liability upon municipalities for constitutional misdeeds of their employees under a respondeat superior theory, which would hold a municipality liable "solely because it employs a tortfeasor" [*371] - that is, one who acts in an unconstitutional manner. *Id. at 691, 98 S. Ct. 2036, 56 L. Ed. 2d 611.* A municipality can be held liable only for violations that resulted from an official municipal policy or custom. *Id. at 694, 98 S. Ct. at 2037-38, 56 L. Ed. 2d 611.* Monell, however, did not

address the standard for imposing individual liability upon a supervisor. As will be seen later, the Supreme Court has addressed the knowledge standard required to impose Section 1983 liability against municipalities for failure to train their employees.

Given the lack of clear guidance from the Supreme Court in Rizzo and Monell, the federal courts have not uniformly adopted a standard to be applied in Section 1983 cases involving the failure of supervisory persons to properly supervise. The real question is how egregious a "failure to supervise" must be in order to impose street-level supervisory [***59] liability under Section 1983. Most of the federal cases have rejected the earlier standard of respondeat superior liability for supervisors. See, e.g., *Palmer v. Sanderson, 9 F.3d 1433, 1437-38 (9th Cir. 1993); Baskin v. Parker, 602 F.2d 1205, 1207-08 (5th Cir. 1979).*

The prominent standard that has emerged in the federal cases has been some form of negligence, differing only in degree. That is not surprising because the Supreme Court has frequently looked to state tort law when discussing issues raised in Section 1983 cases. Monell identified a Section 1983 cause of action as a "constitutional tort." Monell, supra, 436 U.S. at 691, *98 S. Ct. at 2036, 56 L. Ed. 2d 611.* Since Monell, the Court has made repeated references to state tort law. See, e.g., *Wilson v. Garcia, 471 U.S. 261, 276-78, 105 S. Ct. 1938, 1947-48, 85 L. Ed. 2d 254 (1985)* (holding state statute of limitations for personal injury tort suits are to be applied in Section 1983 cases); *Smith v. Wade, 461 U.S. 30, 38-48, 103 S. Ct. 1625, 1631-36, 75 L. Ed. 2d 632 (1983)* (adopting tort punitive damages rules [***60] for Section 1983 cases); *Carey v. Piphus, 435 U.S. 247, 258, 98 S. Ct. 1042, 1049, 55 L. Ed. 2d 252 (1978)* (using tort damages principles as "the appropriate starting point for the inquiry under § 1983"). One commentator has described this [*372] trend as a shift away from "constitutional rhetoric" toward "tort rhetoric" in Section 1983 cases. Sheldon Nahmod, Section 1983 Discourse: The Move From Constitution to Tort, *77 Geo. L.J. 1719, 1719 (1989).* Nonetheless, the notice provision of the New Jersey Tort Claims Act, *N.J.S.A. 59:8-8,* does not apply to

Section 1983 cases. *Felder v. Casey, 487 U.S. 131, 134-38, 108 S. Ct. 2302, 2304-07, 101 L. Ed. 2d 123 (1988); Fuchilla v.* **[**356]** *Layman, 109 N.J. 319, 330-332, 537 A.2d 652,* cert. denied, *488 U.S. 826, 109 S. Ct. 75, 102 L. Ed. 2d 51 (1988).*

The most pro-plaintiff standard is "gross negligence" that has been adopted only by the Second Circuit. *Spencer v. Doe, 139 F.3d 107, 112 (2d Cir. 1998); Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996); Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994).* **[***61]** Seven Circuits have adopted a "knowledge and acquiescence" standard, which is more favorable to defendants. See, e.g., *Robinson v. City of Pittsburgh, 120 F.3d 1286, 1293 (3d Cir. 1997); Sanders v. English, 950 F.2d 1152, 1159-60 (5th Cir. 1992); Walton v. City of Southfield, 995 F.2d 1331, 1340 (6th Cir. 1993); Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995); Ripson v. Alles, 21 F.3d 805, 809 (8th Cir. 1994); Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991); Jojola v. Chavez, 55 F.3d 488, 490 (10th Cir. 1995).* "Under the knowledge and acquiescence standard, supervisors are liable if they knew of and acquiesced in the constitutional violation." Kit Kinports, Supervisory Liability In Section 1983 Cases, 15 Touro L. Rev. 1657, 1660 (1999).

A third standard, "recklessness or deliberate indifference," is applied in nine Circuits, including some that have also utilized the knowledge and acquiescence standard, and falls in between the other two standards. See, e.g., *Febus-Rodriguez v. Betancourt-Lebron, 14 F.3d 87, 92 (1st Cir. 1994);* **[***62]** *Black v. Indiana Area Sch. Dist., 985 F.2d 707, 712 (3d Cir. 1993); Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994); Doe v. Taylor Indep. Sch. Dist, 15 F.3d 443, 452-53 (5th Cir. 1994)* (en banc); *Starzenski v. City of Elkhart, 87 F.3d 872, 880 (7th Cir. 1996); White v. Holmes, 21 F.3d 277, 280 (8th Cir. 1994); Larez v. City of Los Angeles, 946 F.2d* **[*373]** *630, 646 (9th Cir. 1991); Gates v. Unified Sch. Dist. Co. 449, 996 F.2d 1035, 1041 (10th Cir. 1993); Hill v. Dekalb Reg'l Youth Detention Ctr., 40 F.3d 1176, 1192 (11th Cir. 1994).* That "standard provides that supervisors are liable if they acted recklessly or with deliberate indifference to the plaintiff's constitutional rights." Kinports,

Supervisory Liability In Section 1983 Cases, 15 Touro L. Rev. at 1660.

Consistent with the recognition that Congress intended that Section 1983 be liberally construed "to give a broad remedy for violations of federally protected civil rights," Monell, supra, 436 U.S. at 685, *98 S. Ct. at 2033, 56 L. Ed. 2d 611;* see *Gomez v. Toledo, 446 U.S. 635, 639, 100 S. Ct. 1920, 1923, 64 L. Ed. 2d 572 (1980),* **[***63]** we believe the standard most consistent with implementing that goal is one of "recklessness or deliberate indifference." We reject the "gross negligence" standard because it would impose supervisory liability based on constructive notice that a subordinate might engage in a constitutional tort. We also reject the stricter "knowledge and acquiescence" standard because it requires proof of actual knowledge of, and acquiescence in, the constitutional violation. Although "the nonfeasor is the supervisor to whose direction misfeasor officers are committed," *Skevofilax v. Quigley, 586 F. Supp. 532, 543 (D.N.J. 1984),* such a supervisor should not be permitted to cloak himself or herself with immunity by electing not to be informed. A requirement for actual knowledge tends to reward a supervisor for turning a blind eye or deaf ear for fear of what might be seen or heard.

Under the intermediate standard of "recklessness or deliberate indifference" that we adopt, a plaintiff must establish "that: (1) the supervisor ... failed to supervise the subordinate official; (2) a causal link exists between the failure to ... supervise and the violation of the plaintiff's rights; **[***64]** and (3) the failure to ... supervise amounts to deliberate indifference" or recklessness. *Hinshaw v. Doffer, 785 F.2d 1260, 1263 (5th Cir. 1986).* The knowledge element of a plaintiff's case requires proof that the supervisor was aware of facts from which an inference could be **[*374]** drawn that the subordinate was acting in an unconstitutional manner that carried **[**357]** a substantial risk of causing serious harm. *Canton v. Harris, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412 (1989)* (holding that municipality can be liable for failure to train employees when its failure shows "a deliberate indifference to

the rights of its inhabitants.") n2; *Smith v. Brenoettsy, 158 F.3d 908, 912 (5th Cir. 1998); Black v. Indiana Area Sch. Dist., 985 F.2d 707, 712 (3d Cir. 1993).* In reality, the knowledge requirement is a "should have known" test.

> n2 The "deliberate indifference" standard often is also applied to hold prison officials liable for Eighth Amendment violations against inmates. *Farmer v. Brennan, 511 U.S. 825, 828, 114 S. Ct. 1970, 1974, 128 L. Ed. 2d 811 (1994).* However, as Professor Kinports warns, a "deliberate indifference" standard in the Eighth Amendment context is not applicable in a Section 1983 case. Kinports, The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases, 1997 U. Ill. L. Rev. 147, 160 (1997). The Farmer standard is a subjective one that holds prison officials liable "for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer, supra, 511 U.S. at 847, *114 S. Ct. at 1984, 128 L. Ed. 2d 811.* The Farmer Court purposefully rejected the objective standard articulated in *Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989),* a case that addressed the scope of a city's Section 1983 liability for constitutional violations. Therefore, the "deliberate indifference" standard of Farmer and its progeny is inapplicable to Section 1983 cases.

[*65]**

We agree with Professor Kinports that a court should consider five non-exclusive factors when deciding, under the "recklessness or deliberate indifference" standard, whether to impose supervisory liability: (1) whether there were any prior incidents similar to the constitutional violation alleged by the plaintiff; (2) how adequate the supervisor's response was to those

prior incidents; (3) how the supervisor responded to the violation alleged by this particular plaintiff; (4) to what extent the supervisor can be said to have been a causal factor in contributing to the constitutional violation; and (5) to what extent the supervisor was aware of the constitutional misconduct. Kit Kinports, The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases, 1997 U. Ill. L. Rev. 147, 169-184 (1997).

[*375] We must now apply the "recklessness or deliberate indifference" standard to the present case. Ordinarily, the factfinder in a case should decide whether that required level of negligence has been established. That issue, however, may be removed from a jury as the factfinder in highly extraordinary cases in which reasonable minds could not differ. *Fluehr v. City of Cape May, 159 N.J. 532, 543, 732 A.2d 1035 (1999).* **[***66]** Viewing the evidence in this case in light of the principles set forth in Brill, we conclude, as a matter of law, that no supervisory liability should be imposed against Buccino as the supervisor of Simonini. There was no evidence that Buccino was aware of a risk that Simonini was obtaining an unconstitutional arrest warrant for plaintiff. Nor was there evidence that Buccino acted recklessly or with deliberate indifference about whether Simonini had probable cause to arrest plaintiff. Stated another way, there was no evidence probative of the five relevant factors previously enumerated. Based on the lack of evidence, we conclude, as a matter of law, that Buccino did not subject plaintiff to a deprivation of constitutional rights, or cause plaintiff to be so subjected, thereby failing to satisfy the "affirmative link" required by Monell.

VI.

Finally, we note that the term "arguable probable cause," used by the Appellate Division below, does not have a meaning different from "objective reasonableness." Other courts have used the term "arguable probable cause" to describe the standard for determining whether a defendant is entitled to qualified immunity. See, e.g., **[***67]** *Kuehl v. Burtis, 173 F.3d 646,*

649-50 (8th Cir. 1999); Gold v. City of Miami, 121 F.3d 1442, 1445 (11th [**358] *Cir. 1997),* rehearing en banc denied, *138 F.3d 886* (11th Cir.), cert. denied, *525 U.S. 870, 119 S. Ct. 165, 142 L. Ed. 2d 135 (1998); Maxwell v. City of Indianapolis, 998 F.2d 431, 435-36 (7th Cir. 1993).* It is clear from a review of the cases that the term "arguable probable cause" has the same meaning as the term "objective reasonableness." Both terms refer to a standard that entitles a police officer [*376] to qualified immunity if, under the known circumstances, a reasonable police officer could have believed that probable cause existed. Therefore, the Appellate Division did not err, as plaintiff claims, in using an "arguable probable cause" standard to determine if defendants were entitled to qualified immunity. However, because the term can be confusing, we decline to adopt the term "arguable probable cause." The standard for determining qualified immunity in New Jersey is objective reasonableness.

VII.

We conclude that probable cause did not exist to issue the warrant. A majority of the Court [***68] also concludes that in the absence of probable cause, Simonini could reasonably have believed in its existence under an objective reasonableness standard. Three members of the Court disagree with that conclusion. We also find that Buccino did not act with recklessness or deliberate indifference in his supervision of Simonini. Hence, we affirm the judgment of the Appellate Division.

JUSTICES O'HERN and STEIN join in the entirety of JUSTICE COLEMAN's opinion. CHIEF JUSTICE PORITZ and JUSTICES GARIBALDI, LONG, and VERNIERO join in Sections I, II, VI, and VII of JUSTICE COLEMAN's opinion. CHIEF JUSTICE PORITZ and JUSTICES GARIBALDI and LONG join in Section II of JUSTICE VERNIERO's separate opinion, which deals with Simonini's qualified immunity.

CONCURBY:
VERNIERO (In Part)

DISSENTBY:
VERNIERO (In Part)

DISSENT:

VERNIERO, J., concurring in part and dissenting in part.

I concur in the majority's formulation of procedures to be used in deciding the issue of qualified immunity in actions brought under *42 U.S.C.A. § 1983* (Section 1983). I refer specifically to the Court's approach in respect of disputed material facts; that approach is sound and resolves a question confronted **[***69]** by other jurisdictions.

With regard to defendant Simonini, I conclude that he is entitled to qualified immunity under the "reasonable belief" prong of the federal test as applied in *Kirk v. City of Newark, 109 N.J. 173, 536 A.2d 229 (1988),* and other cases. Defendant acted upon the advice of counsel in the context of information obtained by two informants that prompted a series of steps designed to verify the true identity of the suspect. Although ultimately incorrect, Simonini's judgments and beliefs were reasonable at the time. Accordingly, I find Simonini to be immune for the reasons set **[*377]** forth in Section II below, which is joined by three other members of the Court.

I would also find defendant Buccino to be immune. However, I dissent from that portion of the Court's opinion pertaining to that defendant. In my view, it is unnecessary to create a new standard for supervisory liability to dispose of the pertinent issues in this case. Instead, I would find Buccino to be immune on the facts presented and as a logical consequence of the majority's conclusions regarding Simonini.

I.

As part of an undercover investigation of organized crime known as Operation LeJeune, **[***70]** Donald Simonini, an investigator at the New Jersey Division of Criminal Justice (DCJ), received information that one "Frank Schneider" had

been involved in a tractor-trailer hijacking. Simonini obtained that information from two independent sources: first in April 1989 from Anthony Bonura, DCJ's confidential informant, and then in July 1989 from an FBI informant as communicated by FBI Special Agent Robert DeBellis. Agent DeBellis characterized the suspect as "a big kid from the Lodi-Garfield area [,] ... in his twenties [,] ... six foot or over [with] prior involvement with the law." DeBellis also gave Simonini information contained in a State Police report prepared at the time of the crime, December 27, 1988. The report confirmed that there had been a hijacking on or about that date and contained other details.

[**359] Simonini asked DeBellis whether the FBI informant had photographs of Schneider or Mark Vilardi, the other person suspected in the hijacking, and whether the informant could otherwise be of assistance in identifying those men. DeBellis indicated that the informant could not assist with additional information but nonetheless represented to Simonini that the informant [***71] had proven to be reliable to the FBI in the past. (Indeed, the informant's description of details of the crime were verified by the victim and the police reports.)

[*378] After receiving that information and reviewing the State Police report, Simonini asked detectives at the State Police whether the driver of the hijacked tractor-trailer, Clifford Glidden, might be of assistance in identifying the perpetrators. Simonini was told that the driver probably would be of no assistance because of his likely faulty memory caused by fear at the time of the incident and the difficulty in contacting him. (Glidden was asked to assist sometime later, after plaintiff's arrest and release. Although he selected the correct Frank Schneider from a line-up of photographs, Glidden was unable to state definitively that the selected photograph was that of the person who had committed the crime.)

Armed with the information obtained through DeBellis, the FBI informant and DCJ's informant, along with the information found in the State Police report, Simonini set about the task of identifying the suspect. Utilizing a Division of Motor Vehicle

(DMV) database, criminal history and similar databases, Simonini narrowed [***72] the search to four "Frank Schneiders." One of the Frank Schneiders was born in 1944, which would have made him forty-five years old and therefore too old; another lived in Lincoln Park, was born in 1964 but had a height of only five feet, eight inches, which would not have qualified as a "big kid."

The remaining two Frank Schneiders did appear to qualify on the criteria of height, age and location. Frank J. Schneider of Lodi was shown in the DMV database to have a birth date of "August 00, 1961," with an eye color of brown, while Frank J. Schneider of Hasbrouck Heights was shown to have a birth date of "August 2, 1961" and an eye color of hazel. The birth dates raised suspicions. As Simonini later explained:

This is the type of thing that people will do when applying for a driver's license, to alter the number [specifying eye color], so that they can obtain another license under another number, and it's not detected that they are, in fact, one person with two driver's license numbers.

Because of the similarity of birth dates, Simonini concluded that the two Frank J. Schneiders were one and the same person.

Simonini then obtained the State Police master name index indicating [***73] that the individual identified with the August 2nd birth [*379] date had a total of four arrests, including arrests for invasion of privacy, disturbance of the peace, burglary and damage to property. That information corroborated what was learned earlier from FBI Agent DeBellis, namely, that Frank Schneider the hijacker had some prior involvement with the law. Simonini contacted DeBellis again to ascertain whether he had any additional identifiers for Frank Schneider; DeBellis responded that he did not.

Fearing that he might compromise the investigation or endanger the life of the informant, Simonini made no further inquiry and concluded his investigation. Operation LeJeune itself was terminated on July 17, 1989, because the authorities

believed a residential armed robbery was imminent. Before the last date of the operation, Simonini reviewed the information he had obtained concerning Schneider and Vilardi, the other suspected hijacker, with the legal staff at the DCJ. The deputy attorney general assigned to the investigation agreed that Simonini had probable cause to include references to both Schneider [**360] and Vilardi in his lengthy affidavit, which sought arrest and search warrants for plaintiff, [***74] Vilardi, and thirteen others who were targets of Operation LeJeune. With regard to Schneider, Simonini's affidavit detailed in pertinent part the information obtained by the two informants as corroborated by the State Police report. A judge signed the arrest warrants for plaintiff and the other suspects on July 14, 1989.

Vilardi was in the room at the armory immediately following the arrest and informed DCJ personnel that plaintiff was not the right suspect. Plaintiff was promptly released and driven back to work. Two days later, on July 19, 1989, then-Attorney General Peter N. Perretti issued a press release indicating that plaintiff was mistakenly identified as one of the individuals targeted in Operation LeJeune and that he was released two hours after his arrest. The statement also indicated that plaintiff was not involved in the Bruno/Scarfo crime family and that the authorities were still searching for the Frank Schneider, Jr. who was the actual target of the investigation. In addition, an assistant attorney general [*380] sent plaintiff a letter indicating that the press release had been sent to various newspapers and news services to lessen any negative impact resulting from plaintiff's [***75] arrest and brief detention. The Attorney General's Office also offered to write to plaintiff's employer to verify that plaintiff's arrest was a mistake.

On August 3, 1989, the Frank J. Schneider involved in the hijacking turned himself in to authorities. In fact, that Frank Schneider was the same person Simonini had found in the DMV records with the Lincoln Park address and the 1964 birth date. Plaintiffs' suit and this appeal followed.

II.

"The existence of probable cause is a complete defense to a [Section] 1983 claim ...." *Bernstein v. Aivazis, 584 F. Supp. 606, 607 (D.N.J. 1983).* If, in hindsight, it is determined that probable cause did not exist, an officer will still be immune from suit if "a reasonable police officer could have believed in its [probable cause] existence." *Kirk v. City of Newark, supra, 109 N.J. at 184.*

The United States Supreme Court has made clear that, in close cases in which reasonable minds may differ about whether probable cause existed to justify an arrest, the officer should be immune, stating: "If officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986).* **[***76]** Thus, the qualified immunity standard is intended to protect "all but the plainly incompetent or those who knowingly violate the law." Ibid.

Probable cause as a legal standard is, by design, inexact.

In dealing with probable cause ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

[*Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879, 1890 (1949).]*

[*381] At its root, the doctrine of probable cause represents society's attempt at striking a balance between safeguarding citizens from the unreasonable actions of police officers and providing those same officers with the leeway necessary to enforce the law for everyone's protection. "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests." *Id. at 176, 69 S. Ct. at 1311, 93 L. Ed. at 1891.*

In this case, Simonini secured **[***77]** the following evidence or information upon which to base his actions: the

taped conversation [**361] between the DCJ informant, Anthony Bonura, and an Operation LeJeune target, Richard Discorfano, in which it was revealed that a "Frankie Schneider" was involved in the truck hijackings; the statement by FBI Special Agent DeBellis that a second informant, an FBI informant, indicated that a Frank Schneider, Jr. had committed the hijacking; the fact that plaintiff's address, age, height and criminal record were consistent with the FBI informant's description of Frank Schneider, Jr.; the fact that DeBellis told Simonini that the FBI informant had proven to be reliable in the past; and the fact that the details of the crime given by the federal informant were consistent with the victim's version of events and the version found in the investigative police reports.

Even if we assume that the foregoing did not give rise to actual probable cause, the inquiry does not end there. As noted, even if a law enforcement officer's judgments and beliefs turn out to be erroneous, that officer is still protected by qualified immunity if those judgments and beliefs were reasonable under the circumstances. "This [***78] accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they feared being sued." *Hunter v. Bryant, 502 U.S. 224, 229, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589, 596 (1991)* (quoting *Davis v. Scherer, 468 U.S. 183, 196, 104 S. Ct. 3012, 3020, 82 L. Ed. 2d 139 (1984)).* I agree with the conclusion of the Appellate Division that Simonini satisfied this second prong of the analysis. As Judge Collester stated for the unanimous panel:

[*382] Information received and developed by Simonini in this case gave him a reasonable objective belief in the existence of probable cause that plaintiff was one of the hijackers. The recorded conversation between Bonura and Discorfano spoke of a botched hijacking involving "Frankie Schneider." The information received from DeBellis' informant named one of the perpetrators as a Frank Schneider, Jr. and described him as a "big kid" in his twenties with a criminal record who lived in the Garfield and Lodi area. Simonini was entitled to rely on the information supplied by an FBI informant described as reliable,

and in fact the informant's description of the details [***79] of the crime were verified by the victim and the investigative police reports. See *State v. Novembrino, 105 N.J. 95, 120-22, 519 A.2d 820 (1987).* Moreover, Simonini's investigation of relevant records confirmed that plaintiff's appearance, address and criminal history were consistent with the other information supplied as to one of the hijackers. See *United States v. Williams, 10 F.3d 1070, 1075 n. 6 (4th Cir. 1993),* cert. denied, *513 U.S. 926, 115 S. Ct. 313, 130 L. Ed. 2d 276 (1994); Powe v. City of Chicago, 664 F.2d 639, 645 (7th Cir. 1981).*

[*Schneider v. Simonini, 314 N.J. Super. 583, 594-95, 715 A.2d 1018 (App. Div. 1998).]*

Using twenty-twenty hindsight, three members of the Court assert that Simonini should have taken other steps to ensure certainty in the identification of the suspect, Frank Schneider, Jr. However, the test for qualified immunity does not require certainty or even actual probable cause, but only that the officer's belief in probable cause be reasonable. Kirk, supra, 109 N.J. at 184; *Lee v. Sandberg, 136 F.3d 94, 102-03 (2d. Cir. 1997); Madiwale v. Savaiko, 117 F.3d 1321, 1324 (11th Cir. 1997);* [***80] *Johnson v. Schneiderheinz, 102 F.3d 340, 341 (8th Cir. 1996).*

It bears repeating that, "if officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley, supra, 475 U.S. at 341, *106 S. Ct. at 1096, 89 L. Ed. 2d at 278.* "Even plaintiffs' expert did not testify that no reasonable police officer would conclude that an arrest warrant could issue under the circumstances or that officers of reasonable competence could not disagree on the issue of [**362] probable cause for a warrant." *Schneider v. Simonini, supra, 314 N.J. Super. at 595.* Because at the very least there was a reasonable belief in probable cause, Simonini is entitled to qualified immunity for his conduct.

[*383] The fact that Simonini may have lacked actual probable cause does not, and under federal case law cannot, deprive him of immunity so long as his belief in the existence of

probable cause was reasonable under the "reasonable belief" prong of the analysis. The trial court opinion mistakenly forecloses that second, distinct ground for immunity. As the trial court observed:

> Well, you know, it's almost inconceivable that I could find [***81] both that there was no probable cause with respect to [Simonini] and that there was a qualified immunity because it is essentially a review and critique of his behavior which has induced me to conclude that there was no probable cause.

Similarly, three members of the Court believe, "the question is whether Simonini, who obtained the warrant based on his objectively unreasonable affidavit that led to plaintiff's unconstitutional seizure, could nonetheless objectively and reasonably rely on the existence of probable cause. That sounds incongruous, and under the facts of this case, is incongruous." *Ante, 163 N.J. 336, 366, 749 A.2d 336, 352.*

In my view, however, it is not incongruous to note that Simonini reasonably may have believed that he had probable cause even if, in fact, he did not. That Simonini may have omitted additional details from the affidavit does not mean that he believed less strongly or reasonably in the existence of probable cause. The asserted defects in the application do not, without more, foreclose the possibility that defendant maintained a reasonable but mistaken belief in probable cause.

Moreover, although Simonini's affidavit may have been insufficient [***82] to sustain a finding of actual probable cause, it was not so deficient as to render any officer's belief in the existence of probable cause unreasonable for purposes of Section 1983 immunity. As the Appellate Division concluded: "[Simonini's] application for the arrest warrant was not 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable' ...." *Schneider v. Simonini, supra, 314 N.J. Super. at 596* (quoting Malley, supra, 475 U.S. at 344-45, *106 S. Ct. at 1098, 89 L. Ed. 2d at 281).*

[*384] I find no evidence in the record to support the conclusion that "Simonini knew that in failing to tell the judge who issued the warrant any identifying information except plaintiff's name, there was a substantial probability of misidentification given the information in the DMV records." *Ante, 163 N.J. 336, 367, 749 A.2d 336, 353.* In my view, one may arrive at such a conclusion only by delving into Simonini's state of mind. If such a determination is truly needed to dispose of this appeal (I believe it is not), it would appear to be a question for the jury to resolve.

As indicated in the record, Simonini methodically [***83] engaged in a process of elimination before including plaintiff's name in the warrant application. In so doing, Simonini appeared to be making reasonable judgments. For example, when presented with a choice between a Frank Schneider that may have been the right height but not the right weight, and one who was about the right weight but not the right height, Simonini selected the Frank Schneider who was the right height. That was a reasonable approach considering that height is more or less a fixed variable, whereas the weight of an individual can fluctuate. Simonini did more than "act[] on a hunch," ante, *2000 N.J. LEXIS 142,* *56; he made a diligent effort to accurately identify the suspect.

Additionally, the process employed by Simonini yielded an initial pool of only four persons, one of whom was, in fact, the correct Frank Schneider. It is significant that Simonini acted upon the advice of a deputy attorney general in making his [**363] probable cause determination. In Kirk, the fact that the police officer acted upon the advice of an assistant prosecutor was considered by this Court to be one of two factors requiring a finding of immunity, the other being the fact that a child might [***84] have been in physical danger in that case. As we noted: "[The officer] was confronted with a possible case of child abuse and acted on the advice of counsel. Consequently, we find that a reasonably well-trained police officer viewing the facts could have believed that she had probable cause [*385] to arrest defendant." Kirk, supra, 109 N.J. at 187 (citations omitted).

An investigation like Operation LeJeune presents special risks and therefore poses a unique context within which to judge the reasonableness of police actions. No one can deny the pernicious effects of organized crime: it saps the energy and resources of law enforcement, taints the honest marketplace by fostering an underground economy, and -- literally -- puts lives in danger. As Simonini himself stated:

If anything ever happened down the line, where this informant was killed or hurt [or] threatened ... in some way anyone who has knowledge of this informant could be questioned as to, you know, were you responsible for what happened to this informant?

Although not excusing the probable cause requirement, Simonini's concern for the safety of the informant does help to explain how defendant reasonably might [***85] have concluded that the circumstances required him to forego additional investigation before making the arrest. As noted, the emergency-like circumstances evident in Kirk formed the basis of our granting immunity in that case. See also *Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3039-40, 97 L. Ed. 2d 523, 531 (1987)* (explaining how reasonable but mistaken judgments about exigency are similarly protected by immunity).

"The Supreme Court created the qualified immunity defense in order to protect public officials from being sued for every error in judgment, thereby diverting their attention from their public responsibilities and impeding the independent exercise of their discretion." Kit Kinports, The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases, 1997 U. Ill. L. Rev. 147, 190 (1997). Here, Simonini acted upon the advice of counsel within the context of information obtained by two informants that set in motion a process of elimination that led to a reasonable belief, albeit a mistaken one, as to the suspect's identity. Accordingly, this case squarely highlights the purpose of an immunity defense as enunciated by the Supreme [***86] Court. See also *Hayes v. Mercer County, 217 N.J. Super. 614,*

526 A.2d 737 (App. Div. 1987) **[*386]** (holding investigator not liable even though he arrested wrong person).

III.

Having found Simonini to be immune because of his reasonable belief in probable cause, I would find his supervisor, DCJ Deputy Chief Robert T. Buccino, to be similarly immune. In view of the facts presented and the majority's determination in respect of Simonini, I believe it is unnecessary for the Court to create a new standard to resolve the issue of the supervisor's liability.

Buccino was involved to the extent that he supervised the entire operation but the record does not disclose specific, personal involvement in terms of the steps taken by Simonini in respect of plaintiff's arrest. Buccino testified:

In the case of Don Simonini, I wouldn't ask the question do you have probable cause. There is an attorney sitting right along side of him. If Don Simonini had one-year experience as a law enforcement [officer], yes, I would go up to him and say, sure let's go over your probable cause because that would be my job [if] I feel that the officer is inexperienced[,] but with the people that **[***87]** I have in the organized crime [agency] **[**364]** they're all experienced, well-trained, I don't ask those questions ....

That level of involvement is simply insufficient as a matter of law to hold Buccino liable under Section 1983. As the Appellate Division concluded, "with respect to Buccino, the rationale for qualified immunity is stronger since he committed no acts leading to plaintiff's arrest." *Schneider v. Simonini, supra, 314 N.J. Super. at 595.*

The Court's approach also appears to be at odds with the one adopted by the United States District Court in *Skevofilax v. Quigley, 586 F. Supp. 532, 543 (D.N.J. 1984).* In that case, Judge Maryanne Trump Barry, now an appellate judge on the Third Circuit Court of Appeals, observed that a supervisor "might be held liable" if the plaintiff were able to show that the supervisor

"was personally involved in the unlawful action or that there was some causal connection between an act of the official and the [*387] alleged violation ...." Ibid. That standard appears dissimilar to the one adopted by the majority.

According to the United States Supreme Court, the final arbiter of Section 1983 actions, the [***88] qualified immunity standard is designed to provide "ample room for mistaken judgments" on the part of the police. Malley, supra, 475 U.S. at 343, *106 S. Ct. at 1097, 89 L. Ed. 2d at 280.* Judge Barry's formulation in respect of supervisory liability seems most consistent with the overall policy objectives set forth in Malley. Judge Barry's standard would appear to hold the truly culpable supervisors liable for Section 1983 offenses while providing "ample room" for errors or failures in supervisory oversight. In any event, because no new test is required on these facts, I would wait for a more appropriate case before settling on one of any number of competing federal standards.

IV.

In sum, the evidence and information secured by Simonini provided him with a reasonable basis upon which to believe in the existence of probable cause to arrest plaintiff. Thus, he is entitled to immunity. Under the "reasonable belief" prong of the federal test, it is not necessary for actual probable cause to have existed. Nor is it necessary to determine whether actual probable cause existed to dispose of this appeal. Buccino, a supervisor who took no action specific to plaintiff, [***89] should be immune as a logical consequence of Simonini's immunity. The special risks posed by Operation LeJeune provide a context that helps to explain the reasonableness of what occurred in this case.

We must abide by the instruction of the United States Supreme Court and provide the police with "ample room for mistaken judgments ...." Malley, supra, 475 U.S. at 343, *106 S. Ct. at 1097, 89 L. Ed. 2d at 280.* In so doing, we ensure the protections of law enforcement necessary for the safety and well-being of the entire community. There are clear instances in

which police officers [*388] should stand trial because of serious misconduct. This is not one of them.

V.

For the reasons stated, I would affirm the judgment of the Appellate Division.

B. Other opinions, orders, findings of fact, and conclusions of law

Decision and Order of New Jersey Appellate Division *Schneider v. Simonini*, 314 N.J. Super. 583, 715 A.2d 1018, 1998 N.J. Super. LEXIS 392 (App. Div. 1998), decided September 4, 1998, affirmed by New Jersey Supreme Court on March 6, 2000, reported in *Schneider v. Simonini*, 163 N.J. 336, 749 A.2d 336, 2000 N.J. LEXIS 142 (2000), decided March 6, 2000 [A3]

FRANK SCHNEIDER, JR. and SUSAN SCHNEIDER, Plaintiffs-Respondents, v. STATE INVESTIGATOR DONALD SIMONINI and DEPUTY CHIEF ROBERT T. BUCCINO, Defendants-Appellants, and NEW JERSEY DIVISION OF CRIMINAL JUSTICE, STATE INVESTIGATOR JOHN POST, STATE INVESTIGATOR ANDREW O'CONNOR, CARLOS RODRIGUEZ and JOHN D'ANGELO, Defendants.

A-5628-95T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

314 N.J. Super. 583; 715 A.2d 1018; 1998 N.J. Super. LEXIS 392

May 4, 1998, Argued

September 4, 1998, Decided

SUBSEQUENT HISTORY:
[***1] Approved for Publication September 4, 1998.

PRIOR HISTORY:
On appeal from Superior Court of New Jersey, Law Division, Bergen County.

DISPOSITION:
Reversed.

CORE TERMS: informant, investigator, arrest, qualified immunity, hijacker, truck, photograph, probable cause, identification, feet, birth date, hijacking, arrested, conversation, load, guy, target, lived, big, entitled to judgment, existence of probable cause, law enforcement, criminal record, matter of law, eye color, corroborated, prosecutor, handcuffed, abandoned, confirmed

COUNSEL:
Bertram P. Goltz, Jr., Deputy Attorney General, argued the cause for appellants (Peter Verniero, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mr. Goltz, on the brief).

Vincent J. D'Elia argued the cause for respondents.

JUDGES:
Before Judges Newman, Collester and Bilder. The opinion of the court was delivered by COLLESTER, J. S.C. (temporarily assigned)

OPINIONBY:
COLLESTER

OPINION:

[*585] [**1020] The opinion of the court was delivered by

COLLESTER, J. S.C. (temporarily assigned)

Defendants Donald Simonini and Robert T. Buccino appeal from a final judgment of the Law Division finding Simonini, an investigator with the New Jersey Division of Criminal Justice (DCJ), and Buccino, Deputy Chief Investigator of the DCJ, liable under *42 U.S.C.A. § 1983* for violating the civil rights of Frank Schneider by his false arrest and detainment. We reverse on the grounds that defendants were entitled to judgment under the doctrine of qualified immunity. [*586]

Plaintiffs Frank Schneider, Jr. and Susan Schneider filed this § 1983 action against defendants Simonini and Buccino [***2] as well as other law enforcement officers and agencies based on the wrongful arrest of Frank Schneider, Jr. n1 Motions for summary judgment were granted in favor of other defendants, but the motion judge denied summary judgment to Simonini and Buccino as well as to John Post, another investigator with the DCJ, finding that there were genuine issues of material fact as to the existence of probable cause for plaintiff's arrest. We denied defendants' motion for leave to appeal, and the matter proceeded to a jury trial.

n1 In the body of this opinion "plaintiff" refers to Frank Schneider, Jr.

Both sides moved for judgment at the conclusion of testimony. The trial judge dismissed the case against Post based on qualified immunity. However, he found that Simonini and Buccino "demonstrated a deliberate indifference to the existence of probable cause," denied their motion and granted judgment to plaintiffs on liability. The case proceeded to the jury on the sole issue of damages, resulting in an award to plaintiffs of [***3] $ 60,000 against Simonini and $ 15,000 against Buccino. Defendants' motions for judgment notwithstanding the verdict, as

well as for a new trial or remittitur were denied. Plaintiffs' application for counsel fees was granted and a subsequent award was entered for $ 301,944 to be paid by defendants. This appeal followed.

The pertinent facts are as follows. In October 1988, the Organized Crime Bureau of the DCJ began Operation LeJeune, an investigation of the northern faction of the Bruno/Scarfo organized crime family involved in an alleged conspiracy to commit the crimes of armed robbery, drug dealing and arson. Key to the investigation was the cooperation of Tony Bonura, a turncoat informant who was part of the Bruno/Scarfo crime network. Bonura assisted both by providing inside information and by wearing a wire recorder in conversations with investigation targets. Because disclosure of his cooperation could well result in his death, Bonura's identity was a secret known only to those at the [*587] center of the investigation, which included defendants as well as Deputy Attorney General John Mercun. Simonini was the lead investigator and in charge of Bonura. Buccino was the commander of the [***4] Organized Crime bureau of the DCJ. Mercun's responsibilities included consultation with Simonini and Buccino on legal matters including applications for arrest and search warrants prior to submission to a Superior Court judge.

On April 19, 1989, Bonura recorded his conversation with Richard Discorfano, an Operation LeJeune target, in which Discorfano told Bonura that a Mark Vilardi and Frank Schneider, Jr. had botched a hijacking of a truck load of VCRs for Discorfano. The conversation included the following:

A.B. (Anthony Bonura): ...what about the big load, VCRs, shit like that.

R.D. (Richard Discorfano): That ain't them, that ain't them. Those guys are going into hijacking. Remember, I told you I hired a couple of guys to hijack. Those guys, they don't know what they're doing. They handcuffed a guy in South Jersey,

they're bring'em up here, the guys get out of the fuckin' truck, he's knocking on people's fuckin' door.

A.B.: Who stuck them up?

R.D.: They did.

A.B.: Smokey and a...

R.D.: No. No. Frankie.

A.B.: Frankie Schneider?

R.D.: Not the father, the son.

A.B.: [***5] The son. Yea.

[**1021] R.D.: Well. Mark right now is involved with the walkie talkie, Frank Schneider does the shit. Know what I'm saying?

Bonura told Simonini that he did not know any Frank Schneider, Jr. and had only a vague recollection of the name. No further information was obtained on the matter until July 10, 1989, shortly before Operation LeJeune was terminated, when Simonini spoke with Robert DeBellis, an FBI Special Agent assigned to the Hijack Squad. During a conversation focused on other matters, DeBellis told Simonini that he had been advised by his confidential informant that Mark Vilardi and Frank Schneider, Jr. had committed an armed hijacking for Richard Discorfano of a truck loaded with VCRs on the New Jersey Turnpike in South Jersey [*588] and had abandoned the truck and cargo after striking a telephone pole in North Jersey, leaving the truck driver bound in the sleeper section of the truck.

DeBellis' informant told him that Vilardi had an arrest record and lived in Paterson. He described Frank Schneider, Jr. as a "big kid" about six to six feet two inches tall with a large muscular build and in his twenties. He said that Schneider lived in the

Garfield-Lodi [***6] area and that both he and his father had criminal records.

DeBellis told Simonini that the FBI corroborated his informant's information by checking the reports of the State Police and the Hackensack Police Department. These reports confirmed that on December 27, 1988 there was a hijacking at gunpoint of a truck load of Samsung VCRs and televisions near Exit 4 of the New Jersey Turnpike. The driver, Cliff Glidden, had picked up his load at the Samsung warehouse in Saddle Brook, New Jersey and was heading for Maryland when he was hijacked, bound and thrown into the sleeper portion of the tractor. The hijackers later abandoned the tractor trailer and its cargo in Hackensack after striking a light pole in the Little Ferry area.

DeBellis told Simonini that he did not have photographs of Vilardi or Schneider. When Simonini asked DeBellis if his informant could make an identification of the men from photographs, DeBellis said that the informant would be of no assistance. Simonini took the comment to mean that DeBellis would not make his informant available for any identification in order to protect the informant's identity. Simonini followed standard police procedure in not asking DeBellis [***7] for the identify of his informant. However, he was assured by DeBellis that the informant had proved reliable in the past and had been independently corroborated by DeBellis and other FBI agents.

Simonini reviewed his files and found that another of his confidential informants had reported that in December 1988, Discorfano asked for help in "moving" a load of stolen video cassette recorders and cosmetics that he expected to receive. He then [*589] received and read the State Police report of the December 27, 1988 hijacking in which Glidden told the State Police that he left Saddle Brook at 2 p.m. and stopped at a Turnpike service area to use the rest room. He said that on his return a man put a gun to his head, handcuffed him behind his back, bound his feet with tape and pushed him to the sleeper berth portion of the truck. Another man got into the truck at a later time, and both hijackers abandoned the truck after an

accident. Glidden waited ten minutes, broke the tape off his legs and ran to a nearby house for help.

Glidden said that he saw only one of the hijackers, describing him as a "very strong" Hispanic male, twenty-five to thirty years old, about five feet, eleven inches tall [***8] with dark hair, wearing a plaid coat and blue jeans. However, he said that he would not be able to make an identification of the hijacker. The State Police report also indicated that no usable fingerprints or other identifiers were obtained from the crime scene.

Simonini concluded from the State Police report and his conversation with State Police detectives that Glidden would be of little assistance in identifying the hijackers. He also knew that Glidden was an over-the-road trucker and that he would have difficulty contacting him before the termination of Operation LeJeune.

Simonini accessed the Division of Motor Vehicles (DMV) computerized records for "Frank Schneider" and narrowed his list to [**1022] four men. The first had a Montville address and a birth date in May 1944, which made him too old to fit the description given by Glidden and DeBellis' informant. The second lived in Lincoln Park and was born in July 1964, but his listed height of five feet, eight inches did not fit the "big kid" described by DeBellis' informant. The remaining two men were a Frank J. Schneider of 10 Charles Court, Lodi with a birth date listed of "August 00, 1961" and an eye color of brown, and a Frank [***9] J. Schneider, Jr. of 270 Walter Avenue, Hasbrouck Heights, with a listed birth date of August 2, 1961 and an eye color of hazel. Having ruled out the Montville man with a 1944 birth date and the Lincoln Park man of [*590] five feet, eight inches tall, Simonini concluded that the men from the nearby towns of Hasbrouck Heights and Lodi with similar birth dates and heights listed were in fact the same man notwithstanding the slightly different eye color. He testified that in his experience many people involved in criminal activities have multiple driver's licenses with a slight difference in listed personal information. Simonini then ran the name Frank Schneider and

the birth date of August 2, 1961 through the State Police Master Name Index of criminal records and received a report listing arrests for burglary, property damage, invasion of privacy and disturbing the peace, which ostensibly corroborated the information from DeBellis' informant that Frank Schneider the hijacker had a criminal record. The report also listed a height of six feet, three inches and a weight of about 150 pounds.

The most recent arrest on the criminal history report of Frank Schneider, Jr. was in Lodi, but Simonini [***10] did not make any inquiries about Frank Schneider with the Lodi Police Department, testifying he was concerned about compromising the investigation and possibly endangering Bonura. For similar reasons he did not attempt to obtain a photograph from the Bergen County Probation Department, the Bergen County Jail or the Bergen County Prosecutor's Office. Moreover, there was no one to whom he could show a photograph who could make an identification: Bonura had told him he did not know either Vilardi or Schneider, Glidden had told the State Police he could not make an identification, and DeBellis would not offer the assistance of his informant to identify the men. Simonini did not conduct any surveillance of the suspect Frank Schneider, Jr. and did not investigate whether the suspect's father had a criminal record.

Information of an imminent residential armed robbery by investigative targets precipitated the decision to terminate Operation LeJeune. Simonini prepared fifteen arrest warrants including one for plaintiff Frank Schneider, Jr. of Lodi. His lengthy affidavit detailed in pertinent part the information recorded by Bonura, the information from DeBellis' confidential informant and [***11] his own [*591] investigation as to the identity of Frank Schneider, Jr. On July 14, 1989 a Superior Court judge signed the arrest warrants.

The warrants were executed on the morning of July 17, 1989, and all of the men arrested were brought to the West Orange Armory for processing. Assisting in this round-up were members of the DCJ, investigators from the Bergen County Prosecutor's Office and local police. John Post, an investigator

with the DCJ Organized Crime Bureau, was the team leader responsible for arresting Frank Schneider at 10 Charles Court, Lodi. He had been told that the suspect had different driver's licenses and different addresses but was not advised of any uncertainty as to his identity.

Post and the assigned Lodi police officers arrived at the plaintiffs' address in Lodi and were told by plaintiff's wife that her husband was working at a construction site in Wyckoff. When he was found, plaintiff was arrested, handcuffed and placed in the back of the police car despite his protest that he was the wrong man.

Throughout the ride to the West Orange Armory, plaintiff continued to say that he was wrongly arrested. Post called Buccino to advise him of the arrest and told him [***12] that plaintiff forcefully claimed that a mistake had been made. Buccino told Post to bring him to the West Orange Armory and cover his head to avoid the exposure to the media.

Plaintiff was taken immediately on arrival to the "processing room" where the other men were being held. Mark Vilardi, the [**1023] other alleged hijacker, announced that plaintiff was not the man police were seeking. Plaintiff testified that Buccino then asked him if he remembered him from the arrest of his father the week before. Plaintiff said that his handcuffs were removed and that he took a photograph of his father from his wallet and gave it to Buccino to check. When another officer confirmed that the man in the photograph was not Frank Schneider, Sr., Buccino and Post said that he was released and ordered that he be driven back to work.

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On July 19, 1989 the Attorney General issued a press release stating that the Frank Schneider, Jr. of Lodi who had been arrested two days before had been mistakenly identified as one of the individuals targeted in Operation LeJeune and had been released two hours after his arrest. The statement went on to say that plaintiff had no connection or association with the Bruno/Scarfo [***13] crime family and that the Frank

Schneider, Jr. who was the target of the investigation was still being sought. The following day a letter was sent from an Assistant Attorney General to plaintiff indicating that the Attorney General had sent the press release to a number of newspapers and news services to abate any negative impact resulting from plaintiff's arrest and detention.

Later investigation led investigators to look for a Frank Schneider, Jr. near Montville. A photograph was obtained from the Montville Police Department of a Frank Schneider, Jr. with addresses both in Montville and Lincoln Park. On August 3, 1989, the Frank Schneider, Jr. being sought turned himself in to authorities. His arrest record described him as five feet, ten inches tall, weighing 200 pounds. He was in fact the man in Simonini's DMV look-up with the Lincoln Park address and the July 1964 birth date.

The trial judge denied defendants' motion for judgment and granted the plaintiffs' cross-motion on the basis of a finding of a lack of probable cause and insufficient investigation into the identity of the real hijacker. In our view the trial judge misconceived the requirement of probable cause and the **[***14]** application of qualified immunity. We hold that Simonini and Buccino were entitled to judgment dismissing the complaint as a matter of law.

Issues of qualified immunity raised in defense to a claim under *42 U.S.C.A. § 1983* which allege violation of a constitutional right by a public officer should be considered whenever possible for disposition as a matter of law, especially in the context of an alleged unlawful arrest or unlawful search and seizure. *Harlow v. Fitzgerald, 457 U.S. 800, 815-16, 102 S. Ct. 2727, 2736-37, 73 L. Ed. 2d 396, 408-09 (1982); Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 1924,* **[*563]** *64 L. Ed. 2d 572, 577-78 (1980); Plummer v. Department of Corrections, 305 N.J. Super. 365, 371, 702 A.2d 535 (1997); Kirk v. City of Newark, 109 N.J. 173, 184, 536 A.2d 229 (1988).* The test is whether the conduct involved was objectively reasonable in the light of clearly established law. Harlow, supra, 457 U.S. at 818, *102 S. Ct. at 2738, 73 L. Ed. 2d at 410.*

"Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate [***15] clearly established statutory or constitutional rights of which a reasonable person would have known." Ibid.

Since the applicable question is whether a reasonable officer could have believed his or her action as lawful, "in light of clearly established law and the information the... officers possessed," *Anderson v. Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523, 532 (1987),* law enforcement officers are given "ample room for mistaken judgments," *Malley v. Briggs, 475 U.S. 335, 343, 106 S. Ct. 1092, 1097, 89 L. Ed. 2d 271, 280 (1986).* The immunity serves to protect "all but the plainly incompetent or those who knowingly violate the law." *Id. at 341, 106 S. Ct. at 1096, 89 L. Ed. 2d at 278.*

Where the § 1983 claim asserts a lack of cause for issuance of a warrant, "only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable... will the shield of immunity be lost." *Id. at 344-45, 106 S. Ct. at 1098, 89 L. Ed. 2d at 281* (citing *United States v. Leon,* [**1024] *468 U.S. 897, 923, 104 S. Ct. 3405, 3421, 82 L. Ed. 2d 677, 699 (1984)).* A [***16] law officer is entitled to judgment as a matter of law if he or she acted with probable cause or, if probable cause is lacking, that under the known circumstances a reasonable police officer could have believed that probable cause existed. Kirk, supra, 109 N.J. at 184.

In *Hayes v. County of Mercer, 217 N.J. Super. 614, 526 A.2d 737* (App. Div.), certif. denied, *108 N.J. 643 (1987),* the plaintiff was arrested in New York State following a motor vehicle stop look-up which revealed an outstanding warrant on a New [*594] Jersey indictment for a person with the identical first and last names. Other similarities included age and occupation. The plaintiff's lawyer refused to permit his client's photograph to be taken. An extradition warrant was obtained, which was

subsequently dismissed after the victim was unable to make an identification. *Id. at 618-19.*

Speaking to the issue of qualified immunity by a prosecutor's investigator, we said

we are satisfied that the marked similarities between facts known about the indicted man and facts known about plaintiff coupled with plaintiff's undenied refusal to submit to even a photographic identification, established [***17] the objective reasonableness of the investigator's conduct. Even though the investigator was not certain that plaintiff was the right man and even if the investigator's conduct contributed to the decision by the prosecutor and the assistant prosecutor to institute extradition proceedings against the wrong man, the investigator was entitled to summary judgment on plaintiffs' § 1983 claim.

Id. at 621.

Information received and developed by Simonini in this case gave him a reasonable objective belief in the existence of probable cause that plaintiff was one of the hijackers. The recorded conversation between Bonura and Discorfano spoke of a botched hijacking involving "Frankie Schneider." The information received from DeBellis' informant named one of the perpetrators as a Frank Schneider, Jr. and described him as a "big kid" in his twenties with a criminal record who lived in the Garfield and Lodi area. Simonini was entitled to rely on the information supplied by an FBI informant described as reliable, and in fact the informant's description of the details of the crime were verified by the victim and the investigative police reports. See *State v. Novembrino,* [***18] *105 N.J. 95, 120-22, 519 A.2d 820 (1987).* Moreover, Simonini's investigation of relevant records confirmed that plaintiff's appearance, address and criminal history were consistent with the other information supplied as to one of the hijackers. See *United States v. Williams, 10 F.3d 1070, 1075 n.6 (4th Cir. 1993),* cert. denied, *513 U.S.*

926, 115 S. Ct. 313, 130 L. Ed. 2d 276 (1994); Powe v. City of Chicago, 664 F.2d 639, 645 (7th Cir. 1981).

[*595]

The fact that Simonini did not conduct a more detailed investigation does not deprive him of qualified immunity. His concern over potential seepage of information that would disclose Operation LeJeune and endanger Bonura's life was reasonable in light of the nature of the overall investigation. While twenty-twenty hindsight may suggest other steps that could have been taken to insure certainty in the identification of the criminal Frank Schneider, Jr., the test for qualified immunity is not certain or even actual probable cause, but rather arguable probable cause. Kirk, supra, 109 N.J. at 184; see also *Lee v. Sandberg, 136 F.3d 94, 102-03 (2d. Cir. 1997); Madiwale v. Savaiko, 117 F.3d 1321, 1324* **[***19]** *(11th Cir. 1997); Johnson v. Schneiderheinz, 102 F.3d 340, 341 (8th Cir. 1996); Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir. 1990); Green v. City of Welch, 822 F. Supp. 1236, 1239-40 (S.D. W.Va. 1993).* Even plaintiffs' expert did not testify that no reasonable police officer would conclude that an arrest warrant could issue under the circumstances or that officers of reasonable competence could not disagree on the issue of probable cause for a warrant. Our review of the record in the light most favorable to plaintiffs leads us to conclude that there was at least arguable probable cause and that Simonini was therefore entitled to qualified immunity for his conduct.

[1025]** With respect to Buccino, the rationale for qualified immunity is stronger since he committed no acts leading to plaintiff's arrest. Responsibility under § 1983 cannot rest on respondeat superior. *Monell v. Department of Soc. Servs., 436 U.S. 658, 691-92, 98 S. Ct. 2018, 2036-37, 56 L. Ed. 2d 611, 636 (1978).* To affix liability to a supervisor there must be a showing that he had actual or constructive knowledge of the misconduct and that his failure to take action **[***20]** had causal connection to the constitutional violation. See *Post v. City of Fort Lauderdale, 7 F.3d 1552, 1560-61 (11th Cir. 1993),* modified on other grounds, *14 F.3d 583 (11th Cir. 1994);*

Hansen v. Black, 885 F.2d 642, 645-46 (9th Cir. 1989); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir. 1980); Skevofilax v. Quigley, 586 F. Supp. 532, 543 (D.N.J. 1984). Here there is **[*596]** no such showing. Moreover, there was no constitutional violation by Buccino by virtue of our determination that Simonini was entitled to qualified immunity.

While there is no question that plaintiff was wrongly arrested, that singular fact is not in itself determinative in an action brought under § 1983. See *Thompson v. Prince William County, 753 F.2d 363, 364-65 (4th Cir. 1985).* Practical difficulties and inherent ambiguities in law enforcement are such that mistakes will at times be made by police officers, and there must be leeway for some mistakes when officers act reasonably. See *Brinegar v. United States, 338 U.S. 160, 176-77, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879, 1891 (1949).*

In the instant case we find that the application for **[***21]** the arrest warrant was not "so lacking in indicia of probable cause as to render official belief in its existence unreasonable..." Malley, supra, 475 U.S. at 344-45, *106 S. Ct. at 1098, 89 L. Ed. 2d at 281.* Defendants were entitled to assert and prevail on grounds of qualified immunity, and the trial court erred in denying their applications for dismissal and entering judgment for plaintiffs. In view of our determination that plaintiffs did not prevail under § 1983, the order awarding counsel fees is also vacated. *42 U.S.C.A. § 1988*(b).

Reversed.

C. Order on Motion for Rehearing (Reconsideration) of Decision and Order of New Jersey Supreme Court, decided on March 6, 2000, reported in *Schneider v. Simonini*, 163 N.J. 336, 749 A.2d 336, 2000 N.J. LEXIS 142 (2000) [A3] (Same as the Order of which Review is sought [A1])

D. Judgment sought to be reviewed, if different than Order set forth in A above (None: Not Applicable)

E. Rule 14(1)(f) or (1)(g)(i) Material

Statement and Argument by Plaintiffs in Support of Motion for Reconsideration of Decision and Order on Appeal; and for Disqualification of Certain Justices from the Appeal and the subject Motion for Reconsideration, dated May 5, 2000

SUPREME COURT OF NEW JERSEY
DOCKET NO. 46,790

FRANK SCHNEIDER, JR. and SUSAN SCHNEIDER, Plaintiffs-Respondents-Petitioners, vs. STATE INVESTIGATOR DONALD SIMONINI and DEPUTY CHIEF ROBERT T. BUCCINO, Defendants-Appellants-Respondents,	CIVIL ACTION

STATEMENT AND ARGUMENT IN SUPPORT OF MOTION FOR RECONSIDERATION OF DECISION AND ORDER ON APPEAL;
AND FOR DISQUALIFICATION OF CERTAIN JUSTICES
FROM THIS APPEAL AND THIS MOTION

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[Table of Contents and Authorities Omitted]

INTRODUCTION

This statement and argument is respectfully submitted in support of plaintiff's motion for reconsideration of this Court's decision and order on appeal herein, decided on March 6, 2000, a copy of which is submitted herewith, pursuant to N.J. Court Rules, R. 2:11-6.

The reasons that plaintiff seeks reconsideration are: (a) Honorable Deborah T. Poritz, Chief Justice, and Honorable Peter Viernero, Justice, erred in not disqualifying themselves on the appeal as required by law, in accordance with the New Jersey Rules, and violated plaintiff's constitutional rights; (b) the Court, or the majority as the case may be, misapprehended certain material facts contained in the record, which if decided correctly would create a different result; and (c) the Court, or the majority as the case may be, misapprehended or misapplied certain aspects of the law.

Bringing the issue of disqualification on the appeal and this motion to the attention of the honorable members of this Court, and thereby require them to sit in judgment of themselves, as they do on a regular basis with respect to other members of the bar and the State's judiciary, is an uncomfortable task.

It is for that reason that the Court Rules governing the disqualification of judges from cases were designed so that attorneys are not required to ask judges before whom they appear to recuse themselves, instead requiring the Judge to do so on his or her own motion where disqualification is required by the rules. For the same reason, even the consent of the parties will not cure a failure to recuse. E.g., R. Canon 3 (D); McVoy v. Board of Adjustment of the Township of Montclair, 213 N.J. Super. 109, 516 A.2d 634 (App. Div. 1986). Here there was no consent by plaintiff; and there was no requirement that they make a motion.

The named Justices were the attorneys of record for defendants Simonini and Buccino during the pendency of this action. Because of the 4 to 3 split decision, in which the votes of the named Justices were determinative, it is now more crucial

that the named Justices, or the other members of the Court, decide that the named Justices be recused.

Disqualification under the New Jersey Rules does not require the existence of actual bias or prejudice, or actual impropriety, albeit it is suggested herein that there is evidence from which such bias might reasonably be perceived by third parties. Even without actual bias, however, at issue is one of the most important and fundamental tenets of the codes of ethics in this State, which is the avoidance of the appearance of impropriety, and the preservation of the integrity of the Courts and the judicial process.

As stated by the Court in United States v. Nobel, 696 F.2d 231 (3rd Cir.1982), cert. denied, 462 U.S. 1118, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983), quoted by the Appellate Division in State v. Tucker, infra, and in accord with numerous U.S. Supreme Court decisions prior and subsequent thereto:

> [O]ne of the principal functions of a judicial disqualification statute is to maintain public confidence in the integrity of the judicial process, which in turn depends on a belief in the impersonality of judicial decision making.

Furthermore, the failure of the Justices to recuse themselves implicates, in a most serious way, the due process and taking provisions of the Fourteenth and Fifth Amendments of the U.S. Constitution, as well as the equal protection provisions.

Obviously, upon a recusal of the two Justices, this case would have had a different result, without more, as least with respect to defendant Simonini. Without the votes of the two named Justices, the decision of the Court would have been 3 members in favor of reversal as to defendant Simonini, and 2 against, instead of a 4 to 3 affirmance. However, additionally, it is also contended that the Court, or at least the majority of the Court, was either unaware of critical testimony in the 4,500 page record, or misapplied the testimony and/or the law.

Finally by way of introduction, it is plaintiff's contention that the same Justices must similarly recuse themselves on this motion for reconsideration (as well as from all further proceedings in this action). This similarly should be done on the Justices' own motion. However, plaintiff so moves if the Justices do not do so on their own motion.

POINT I

THE JUSTICES OF THIS COURT WHO APPEARED AS ATTORNEY OF RECORD FOR DEFENDANTS IN THIS ACTION, SHOULD HAVE RECUSED THEMSELVES FROM THIS APPEAL, AND SHOULD NOW DO SO ON RECONSIDERATION, AS WELL AS ON THIS MOTION

Honorable Deborah T. Poritz, Chief Justice, and Honorable Peter Viernero, Justice, were required, on their own motion, to recuse themselves from the appeal. They are similarly required to recuse themselves on this motion and on any reconsideration.

New Jersey Court Rule, R. 1:12-1 (c) requires that the judge of any court shall be disqualified from sitting on any matter where the judge has been attorney of record or counsel in the action.[8]

R. 1:12-1 requires that where disqualification is required, the judge shall do so on the judges own motion, although under R. 1:12-2 any party may also make a motion for disqualification.

The Code of Ethics, R. 1:14 et seq., similarly applies to all judges of all courts of this State. See also R. 1:18, "It shall be the duty of every judge to abide by and to enforce the provisions

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[8] Under Rule R. 1:1, all rules under Part I are expressly applicable to the courts specified, including the Supreme Court, unless expressly excluded specifically elsewhere.

of the Rules of Professional Conduct, the Code of Judicial Conduct . . ."

R. Canon 1 states that a Judge should uphold the integrity and independence of the Judiciary, and that the provisions of the Code should be construed an applied to further that objective.

R. Canon 2(A) states that, "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Referencing and buttressing R. 1:12-1, R. Canon 3 similarly provides for disqualification of a judge, where the judge's impartiality might reasonably be questioned, including but not limited to instances where:

> (a) the judge has. . . personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a witness concerning it;. . .
>
> (c) the judge knows that he or she. . .any other interest that could be affected by the outcome of the proceeding;. . .

R. Canon 3 (D) precludes a judge, disqualified by the terms of the Canons, from avoiding the same by obtaining the consent of the parties.

Regarding the other Justices of this Court, R. Canon 3 (B)(3)(a) imposes on every judge disciplinary responsibilities for all other judges. Accordingly, it is submitted that each member of the Supreme Court has a sacred duty to act where disqualification is required of any other member.

This action was commenced in 1991, as this Court noted in its decision, based upon an arrest of plaintiff Frank Schneider in 1989. Chief Justice Poritz was Attorney General from January 1994 through July 1996, during which time she was the attorney of record for defendants, and during which time there was extensive motion practice and the trial (1/9/95-3/16/95). Justice Viernero was Attorney General between July 1996 through August 1999, during which time he was attorney of record for defendants. His tenure included the appeal before the Appellate Division and even after the filing of the Petition for Certification herein. The New Jersey Division of Criminal Justice, as well as Bucccino and Simonini, were named defendants in the caption when under the name Deborah T. Poritz a motion for leave to Appeal to the Appellate Division, and later to the Supreme Court, was made.

As attorneys of record for defendants Simonini and Buccino in this action, the names Poritz and Verniero were listed on court papers, including briefs on motions, and briefs on appeals. The decision and order of the Appellate Division appealed herein lists Justice Viernero as attorney of record for the defendants Simonini and Buccino. Schneider v. Simonini, 314 N.J. Super. 583, 584, 715 A.2d 1018.

With respect to Justice Verniero, plaintiff's Petition for Certification to this Court was filed in January, 1999. At that time, and until just before his swearing in on September 1, 1999, it is understood, Justice Verniero was attorney of record for the defendants. This means that Justice Verniero was the attorney of record on defendants opposition to plaintiff's Petition for Certification, on this very appeal.

The foregoing rules are so clear and straightforward[9], particularly in the case of the prior appearance as attorney of

[9] As this Court stated in In Re Opinion 569, 103 N.J. 325, 327, 511 A.2d 119 (1986), the rules for attorneys leaving government practice are intended to be "straightforward". So, it is submitted, are the rules governing the case of prosecutors becoming judges.

record in the action [R. 1:12-1(c); R. Canon 3 (1)(b)], as to require no interpretation. They are, mandatory, and do not require the motion of a party to make them so. They should be implemented sua sponte.

While no more should be required, there is other support for the proposition, as a matter of principle, in reported cases. Of primary importance, and underlying in principle all of the rules, in the tradition of this Court, is the avoidance of an appearance of impropriety. R. 1:12-1(f) ("when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so"); R. Canon 3 (C)(1)(a) ("A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . .").[10]

By comparison, in 1983, this Court issued a directive relating to judges hearing cases where they previously held prosecutorial roles, in criminal matters. See State v. Tucker, 264 N.J. Super. 549, 625 A.2d 34 (App. Div. 1993), and State v. McNamara, 212 N.J.Super. 102, 514 A.2d 63 (App.Div.1986), certif. denied, 108 N.J. 210, 528 A.2d 30 (1987).[11] That directive stated:

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[10] The standards traditionally stated by this Court are in accordance with the American trend generally. E.g., Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges (1996) (Aspen Law & Business, New York, Order code: 85560;ISBN: 0-316-28556-0).

[11] This Court made a distinction for assistant prosecutors in In re Advisory Opinion 361, 77 N.J. 199 (1978), ruling that an assistant prosecutor could not handle a matter involving the office for a period of six months, and could never handle any matter in which the assistant prosecutor had had any involvement, participation or responsibility in it, or in which the assistant prosecutor acquired any knowledge.

In Ferren v. Sea Isle City, 243 N.J. Super. 522, 580 A.2d 737 (App. Div., 1990), recusal was held not required, where the judge was formerly affiliated with the firm who had in the past

(cont'd)

> 1. Except in extraordinary circumstances, a judge should disqualify himself in a criminal matter which was pending in his office when he was the prosecutor or county public defender, whether or not he actively participated in the investigation, prosecution or defense of the case, or had actual knowledge of it.
>
> The reason for this is that as the prior head of either office, the judge would have had the overall responsibility for the conduct of the case. [Emphasis added.]
>
> 2. A judge should disqualify himself or herself from hearing a criminal matter involving a defendant who the judge, in his or her previous capacity, had personally prosecuted or defended, or had represented in a civil matter in the past.
>
> The reason for this is that the appearance of judicial impartiality must be preserved. [Emphasis added.]

While this is not a criminal matter, it is suggested that recusal is even more mandatory here. Not only were the Attorney Generals the attorneys of record for the defendants, but Investigators (one, Buccino, being the Chief Investigator of a joint task force of organized crime and narcotics with 62 people under him) and several Deputy Attorney Generals participated in the entire phase of the investigation, obtaining arrest warrants, preparing motions, and appearing at trial. Three Deputy Attorney Generals were in court almost every day of the trial. Deputy Attorney Generals worked on this appeal. Buccino was even present at the Appellate Division oral argument. It is ludicrous to think that the Attorney General during the years

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represented the party in other matters, but did not represent the party on the case before the court.

1994 through 1999, was not well aware that its chief investigator and senior investigator were defendants in a precedent setting lawsuit.

Moreover, as aforesaid, of greatest importance is the strong doctrine in this State of the avoidance of an appearance of impropriety by judges and lawyers, in the interest of the integrity and image of the Courts. R. 1:12-1(f); R. Canon 3 (C)(1)(a). Those rules have nothing to do with actual bias or prejudice. They do not concern actual impropriety. The issue that they address is one, very simply, of the appearance of impropriety, without regard to actual impropriety.

Traditionally, the Courts of this State, including particularly this Court, have held the avoidance of the appearance of impropriety to be an important and fundamental requirement of judges in this State. As aforesaid, of concern in the case of judicial conduct, is the integrity of the Courts and the judicial process.[12] E.g., In Re Opinion 569, 103 N.J. 325, 329, 511 A.2d 119 (1986), where the court noted that the appearance of propriety also has an added dimension where public bodies are involved and public officials are concerned.

Finally, it is submitted that the issue of appearances of propriety should become clearer by imagining the opposite

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[12] In In Re Opinion 415, 81 N.J. 318, 407 A.2d 1197 (1979), this Court noted the increased need for sensitivity by the bar to the avoidance of appearances of impropriety, and that the Legislature of this State had also indicated its awareness of the same, in relation to its own members. The Court has reaffirmed the doctrine on numerous recent occasions. E.g., In Re Advisory Committee on Professional Echics, 162 N.J. 497; 745 A.2d 497 (2000); Paruszewski v. Township of Elsinboro, 154 N.J. 45, 711 A.2d 273); In Re Opinion 682, 147 N.J. 360; 687 A.2d 1000 (1997); In Re The Inquiry of Evan W. Broadbelt, J.M.C., 146 N.J. 501, 683 A.2d 543, 25 Media L. Rep. 1074 (1995) (failure of judge to avoid appearances of improprieties).

situation; i.e., that Vincent J. D'Elia, attorney for the plaintiff, were now on the Supreme Court to hear the appeal.[13]

POINT II

THERE IS AMPLE ROOM FOR A PERCEPTION BY THE PUBLIC AND OTHER JUDGES OF PARTIALITY AND IMPROPRIETY IN THE CIRCUMSTANCES OF THIS CASE, MAGNIFIED BY THE DIVISION OF THE COURT ON THE ISSUES. THERE ARE AMPLE FACTS FROM WHICH MOTIVATION FOR BIAS MAY REASONABLY BE INFERRED

The division of the Court in this case is of obvious significance. The decision of the Court affirms the finding of the trial court that there was no probable cause for the arrest. Yet, on the deciding vote on the issue of the reasonableness of the Attorney General's senior investigator, Donald Simonini, four members of the Court sided with the employees of the Attorney General's office. Two of those votes were by the two Justices who during the pendency of the action on appeal were attorneys of record for defendants Simonini and Buccino—thereby sitting on their own case—and whose former firm, or the equivalent, was and is still the attorney of record.

Thus, crucial votes were by two persons who under the Court Rules and the Code of Judicial Conduct, should have disqualified themselves. There is ample room for the public or other judges to perceive bias and partiality, and thus impropriety, in the actions of the decisive majority of the Court.

Justice Verniero's decision made repeated references to the actions of the Attorney General's office [pgs. 6, 14, 16], and

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[13] Obviously, in that case there would also be the issue of personal involvement. However, what if Vincent J. D'Elia were the member of a firm, and/or the leading member thereof, which firm also appeared as the attorney of record?

specific actions of the attorneys of that office. Those comments, coupled with other aspects of the involvement with this case by the Attorney General's office, including Buccino's testimony of the daily involvement in the matter by the Deputy Attorney Generals, could suggest in the eyes of others a concern by the Justices for defending the actions of their attorneys, ahead of the need to make a fair and impartial decision with respect to the issues in this case.

It is irrelevant that neither of the Justices of this Court were Attorney General when the wrongful arrest of Frank Schneider occurred. For six (6) years, the two Justices of this Court were in control of this litigation. They were in charge of those who were handling this case. Senior personnel were involved. It is significant that the Attorney Generals and their senior people did not seek a settlement of the case. In fact the certification of the undersigned herewith attests to the adamant refusal of the Senior Attorney General to discuss any settlement, claiming that none would be permitted by Attorney General Poritz.[14]

It appears that this was a case that cried out for settlement--at all times during the past 6 years. Yet, the Office of the Attorney General steadfastly refused to entertain settlement, even after the trial. Instead, Attorney General Viernero decided to appeal to the Appellate Division. There, they were successful, but with a final result where three Justices of this Court--Justices not associated with the Attorney General's office--now say the Appellate Division was wrong, and the trial court was right.

It is far from, it is respectfully submitted, a mere "fanciful possibility" (Higgins v. Advisory Comm. on Professional Ethics, 73 N.J. 123, 129, 373 A.2d 372 (1977)), that the public or other

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[14] In fact, as plaintiff pointed out in the briefs on appeal, the Attorney General's office exhibited what could only be characterized as an unusually obstinate refusal to seek out a resolution without protracted litigation, nothwithstanding the escalating exposure that the State faced thereby.

judges might have the perception that the actions by the Justices here were motivated more by their interest in protecting their former offices as Attorney General, and their reputation arising out of the same, than by their interest in deciding the case on its merits.

That interest, it is respectfully submitted, might be no more than concern for negative reflection on their personal and professional reputation, for their respective failures to recognize that this case should have been settled, in accordance with its merits and the strong public policy pronounced by this Court repeatedly, in favor the resolution of lawsuits in such a manner. E.g., Karpovich v. Barbarula, 150 N.J. 473, 482, 696 A.2d 659 (1997); Ziegelheim v. Apollo, 128 N.J. 250, 263, 607 A.2d 1298 (1992); Nolan v. Lee Ho, 120 N.J. 465, 472, 577 A.2d 143 (1990) (quoting Jannarone v. W.T. Co., 65 N.J. Super. 472, 168 A.2d 72 (App. Div.), certif. denied, 35 N.J. 61 (1961)); Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 35, 134 A.2d 761 (1957). It is not difficult to discern, that, but for the votes of these former Attorney Generals the State would have suffered a substantial liability, a substantial part of which could have been avoided had the case been properly managed during its long-term history.

Certainly, had the Justices voted for reversal herein, they would have been publicly admitting the mismanagement of this case for the previous six years, at a tremendous waste of taxpayer money.

There is ample basis for a perception by the public or other judges of the appearance of impropriety, and from which it would be reasonable to infer that the Justices who formerly defended the defendants herein, and whose attorneys were active participants in the arrest now the subject of this action, were biased in favor of the defendants.

POINT III

THERE IS ALSO SUFFICIENT EVIDENCE FROM WHICH IT MAY BE REASONABLY INFERRED THAT THERE WAS ACTUAL INVOLVEMENT BY THE JUSTICES IN THIS CASE WHILE ATTORNEY GENERAL, AND/OR THAT AS ATTORNEY GENERAL ACQUIRED KNOWLEDGE OF THE CASE

The foregoing discusses the reasons why it was error for Justices Poritz and Viernero to not recuse themselves, for reasons other than active involvement in the case while Attorney General. Based upon the Rules nothing more should be required for mandatory recusal. However, there is also evidence of actual involvement in this case. Again, this is not to say that the Justices even remember any actual involvement. However, that is not the point. If they were involved, if they recall any participation, then it is another reason for the need for recusal.

According to Buccino's testimony, operation Lejune was a major investigation, jointly conducted for 10 months by the Division of Law and the Division of Criminal Justice, with the Deputy Attorney Generals working daily with investigators. There were wire taps, meetings, surveillances, audio and video, of 13 known criminals. Over 100 people were involved in the arrests of the organized crime people and the innocent Plaintiff (T23 page 35). The arrests were made jointly by the Division of Criminal Justice and the Division of Law, both directly under the Attorney General. It is difficult to imagine that it did not have the attention at all times of the Attorney General.[15]

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[15] Based upon the testimony of Robert T. Buccino he served on a high level in the Division of Criminal Justice, not that far below the Attorney General. It certainly would be a reasonable inference from facts in the record that all of the Attorney Generals serving while he was in office were aware of his activities.He was Deputy Chief Investigator Division of Criminal Justice (T23 page 3); an Investigator in 1967, (page 4) *(cont'd)*

Thereafter, it became a precedent setting case, with the wrongful arrest of plaintiff, followed by this lawsuit. No one had previously sued the Chief Investigator of the Organized Crime Bureau of the Division of Criminal Justice. No one had ever sued a Senior Investigator of the Division of Criminal Justice at the level of Donald Simonini for false arrest.

During the trial spanning two months, at least two attorney from the Attorney General's office were present at all times. Former DAG Ershow-Levenberg, one of the trial attorneys, recently advised the undersigned that she and Senior Trial counsel Glenn Jones frequently discussed this matter with their supervisors. In addition, Robert Cody, the third attorney at the trial answered to George Avery, who even attended a settlement conference during the trial. This massive investment of personnel, time, money,and the Chief Investigator, was certainly discussed with the Attorney Generals.

In the alternative, even if there was no active involvement, the knowledge of the case and personnel, during their respective tenures, require recusal. Finally, even if the sitting Justices have no present recollection of their involvement, or what, if any, knowledge they acquired while serving as attorney of record herein, the potential of such information or their relationship with those directly involved, might have affected, or might have appeared to affect, their reasoning, consciously or subconsciously.

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undercover investigation 1967, (page 5) and worked as a lieutenant in the Intelligence Division headquarters in 1970, (page 7). After retiring in 1984 Buccino was appointed by the Attorney General for New Jersey to initiate a task force on narcotics and organized crime. In 1985 Buccino was the first person hired by the Attorney General to organize these two task forces, (page 11) Buccino organized the narcotics and organized crime task forces, hired 25 investigators who worked directly with the State Police and Deputy Attorney Generals. In 1985 he became the Deputy Chief of Investigators with 62 investigators under his command (page 12). He worked directly with Chief Attorney Bob Carroll (page 15).

POINT IV

THE RECUSAL POLICY OF THE CHIEF JUSTICE CONTAINED IN THE NOTICE TO THE BAR DATED SEPTEMBER 3, 1996 CREATES ADDITIONAL STATE AND FEDERAL EQUAL PROTECTION ISSUES

The Chief Justice surely could not have presumed that "Notice to the Bar", dated September 3, 1996, was not intended to apply to those cases where disqualification is required under the Rules. It is not only in conflict with the Rules discussed above, but it raises additional federal constitutional issues.

The 1972 case cited in that notice, Laird v. Tatum, 409 U.S. 824, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972), was decided before extensive revisions to the federal disqualification statute, 28 U.S.C. § 455 in 1974. See e.g., the extensive review of the history in Del Vecchio v. Illinois Dep't of Corrections, infra.[16]

Where recusal is required under the Rules, this notice, if followed, would create a rule applicable to only one judge of the State, while a different rule applies for all others. This would create a prohibited selective application of the law in violation of the equal protection provisions of the State and U.S. Constitutions. That analysis would also seem heightened here,

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[16] Significantly, the 1974 revisions added a new subdivision (a), similar to (although less restrictive) the New Jersey doctrine of "appearance of impropriety", which states, "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." See also United States v. Arnpriester, 37 F.3d 466, 467 (9th Cir. 1994) where it was held that the former United States Attorney could not sit as a judge in a matter that was pending that office while he was United States Attorney. The Court held that both 28 U.S.C. § 455(a) and 28 U.S.C. § 455(b)(3) required recusal. Finally, 28 U.S.C. § 455(b)(2)added a provision for lawyers in non-governmental roles, similar to the rule in this State.

given that the core subject of this lawsuit is the violation of rights under the Constitution of the United States.

Finally, it is respectfully submitted that this notice of the Chief Justice's prejudgment may itself be interpreted as evidence of a bias or predisposition in favor of the Attorney General's office. The New Jersey Supreme Court enjoys a national reputation of making ethical decisions which are even more stringent than the federal standards. That reputation should be preserved.

POINT V

THE PARTICIPATION BY THE NAMED JUSTICES IS A DENIAL OF DUE PROCESS TO THE PLAINTIFF IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND A TAKING OF PROPERTY IN VIOLATION THEREOF

It has long been recognized as elementary that "a fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955). A necessary component of a fair trial is an impartial judge. See ibid.; Tumey v. Ohio, 273 U.S. 510, 532, 71 L. Ed. 749, 47 S. Ct. 437 (1927). In Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986) (involving a split decision of a state's highest court, in a civil case), the Court, citing Murchison, stated:

> More than 30 years ago Justice Black, speaking for the Court, reached a similar conclusion and recognized that under the Due Process Clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." In re Murchison, 349 U.S. 133, 136 (1955). He went on to acknowledge that what degree or kind of interest is sufficient to

> disqualify a judge from sitting "cannot be defined with precision." Ibid. Nonetheless, a reasonable formulation of the issue is whether the "situation is one 'which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.'"

Whether the "appearance" of impropriety is alone sufficient has not been addressed specifically by the U.S. Supreme Court, and one court in a split decision has said not. E.g., Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363 (7th Cir. 1994) (en banc), cert. denied, 131 L. Ed. 2d 290, 115 S. Ct. 1404 (1995). However, as aforesaid, there is ample evidence in this case, from which actual bias can be inferred. Moreover, this case is not an ordinary state civil claim. The very subject matter is the rights of the plaintiff under the Fourth and Fourteenth Amendments to the U.S. Constitution.

The participation in this case by the Chief Justice and Justice Veniero—sitting on their own case—is a violation of plaintiff's rights under the due process clauses of the Fourteenth and Fifth Amendments of the U.S. Constitution, and a taking of property under the Fifth Amendment. See also, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

POINT VI

THE COURT, IN THIS "INCONGRUOUS" DECISION, ERRED IN REVIEWING MATERIAL FACTS, AND OVERLOOKED OR MISAPPLIED MATERIAL PRECEDENTS

The inquiry into probable cause, and even more so the objective reasonableness of an officer's belief, is highly factual. Given that premise, in this Court's "incongruous" decision, there are numerous factual issues determined by the majority, or the

Court, as the case may be, that overlook key facts, or make improper conclusions thereon. Also, the Court improperly invaded the fact-finding of the trial court below. Finally, the Court, or the majority, as the case may be, misapplied or overlooked its own precedents.

It is submitted that a reading of the voluminous testimony of defendants' witnesses, including that of the defendants themselves, would persuade any reasonable person that the claim of efforts to identify the Frank Schneider suspect, and the claim of concern for the informant, are fabricated claims.

It is impossible to even attempt to cover in this statement, the important facts from testimony of some 27 witnesses, at least 11 of whom were members of law enforcement, the transcript for which is some 4,500 pages, in a trial that commenced on January 9, 1995 and was concluded on March 16, 1995. Plaintiff requests the opportunity to do so on reconsideration. The following are a few of those points.

A. The Court's Decision on the Reasonableness of Simonini's belief in the Existence of Probable Cause is Contrary to Reason

Three members of this Court found that there was no probable cause for the arrest of plaintiff.[17] Both opinions of the Court quoted Buccino, Simonini's superior--in the exculpation of Buccino from supervisory liability--in his description of Simonini as an "experienced, well-trained" officer. Yet, at the same time, a majority of the Court found this supposedly more than competent officer to have been reasonable in his belief that there was probable cause. The incongruity is readily apparent.

B. Defendant Simonini's Reliance on Second-Hand Information obtained from the FBI Agent, which the

[17] Presumably the majority apparently did not vote on that issue, since they voted to find qualified immunity, rendering the issue of actual probable cause moot.

FBI obtained from an alleged, but Unidentified FBI Informant, was not Reasonable, in Accord with this Court's Precedents

The Court's determination as to the reasonableness of reliance on the second-hand information of an informant's informant, is not in accord with the Court's precedents, including the recent decision in State v. Caldwell, 158 N.J. 452, 730 A.2d 352 (June 17, 1999).

C. That FBI Agent DeBellis told Simonini that the Suspect Frank Schneider was "six feet or more" in Height", is not Supported by the Evidence, and Materially Affected the Decision on the Reasonableness of Simonini's belief in the Existence of Probable Cause.

In addition to the fact that the information was highly erroneous, without the "six feet or more" characteristic, there would not have been a scintilla of information in Simonini's possession to link one of the four Frank Schneider's found in the DMV records (the 6'2" one being plaintiff), with the suspect Frank Schneider. This was discussed at length in plaintiff's supplemental brief herein dated November 26, 1999, in the Introduction and Point III, and will not be repeated at length herein. It was not supported by the weight of the evidence.[18] It is submitted that this was overlooked by the majority, if not the entire Court. An examination, again, of Simonini's actual testimony in the two times he appeared during the trial is essential here, because Simonini's testimony and his only written

[18] E.g., Simonini stated in his written report to his superiors that the only information DeBellis could provide was that he was a "big kid" with a muscular build, with nothing about being 6' tall. [PADa 28, second paragraph]. Neither Simonini nor Buccino remembered DeBellis having mentioned the "6', 6'2"". See e.g. defendant Simonini's testimony at 9T92:11-20; defendant Buccino's testimony at 23T10-12; 150:1-5.

communication differs from the DeBellis stipulation, accepted without testimony.

D. It was Erroneous and Unreasonable for the Majority to accept Simonini's Obviously Contrived Testimony as Truthful

This was mentioned in plaintiff's briefs on appeal, but provides a basis for development on reconsideration. [E.g., Supplemental Brief, Point IV.] The Court also erred in it's evaluation of the application of confidentiality or secrecy in this particular investigation. There is no dispute regarding the importance of these issues. However, the Court relied on a valid principle which has no applicability here. The record is too extensive to cite here. One example is that there is no relationship between being concerned for the anonymity of an informant and ceasing to establish Schneider's identity. Bonura could not identify the hijacker Frank Schneider, Jr. However, he knew his father, the organized crime member; and he could easily have identified a photograph of the father which through a cursory investigation could be linked to the son. This contorted excuse for conducting no investigation should not be condoned. Law enforcement agencies, county, state, local and even corrections could have been checked but were not.

The record shows that there was no reasonable basis that the issue of confidentiality limited the Deputy Attorney Generals or State investigators from conducting a discrete and completely covert verification of the identity of the Frank Schneider who hijacked the truck.

FBI Agent DeBellis and the only taped reference to Frank Schneider, Jr. (in April 1989) specifically mentioned that the hijacker was the son of a known mob related figure, Frank Schneider, Sr. nicknamed "Spider". It would have been easy to verify the father and son. This deliberately falsified excuse by Simonini suggests that the resources of our entire Division of Criminal Justice could not confirm who a person is (when records exist on the person and his father) without compromising an investigation. This perverse logic is insulting. Nothing in the

record supports this fabrication. The evidence at the trial was that Frank Schneider Sr. and Jr., the criminals, were arrested together in Montville and photographs existed in the files. Plaintiff had been arrested for municipal violations and had been on probation. His photo existed in Lodi and Bergen County. There are hundreds of ways to covertly establish the identify of someone. Professional law enforcement officers regularly obtain such information without compromising an investigation, especially where dealing with organized crime.

Witness after witness said that they would have done more, or that there are many ways to confirm identification, or that the photos could have been examined or other investigative efforts undertaken. There are many references in the testimony of the police expert, common sense, and basic techniques. Plaintiff states that the trial transcript proves that Simonini made up the excuse of confidentiality here, and that both parties' witnesses provided evidence that he did not act reasonably.

A DCJ investigator could easily have contacted a member of the Bergen County Prosecutor's Office (see testimony of O'Conner and Gonzalez) or a trusted local police officer who could assert that he is investigating a Municipal Court warrant for a failure to appear on a motor vehicle infraction--or the probation department wants information on Frank Schneider Jr. for failure to pay a fine or failure to make child support payments. These activities are routine. The informant Bonura was never consulted to see how he might suggest verifying the ID of Frank Schneider.

No one disputes the importance of confidentiality. However, the Defendants did not produce any valid response to the many questions when asked on cross examination why they did not try one of many methods to covertly establish someone's identity. Their excuse is insulting. The entire Division of Criminal Justice cannot reasonably argue that there way by using a trusted person in insurance, real estate, banking, fraud and other agencies—to help confirm the identity of the two Frank Schneider, Jr's. In a truly covert operation even the contact

person would not be told the reason why someone is verifying the identity of a person. None of these were done here.

The Court should be incensed that such a false argument was ever presented and argued by the Attorney General's Office.

The court is asked to permit plaintiff to provide the pages of references counsel asserts he can to show specific examples in the testimony (twice on direct and once on cross), of Simonini and the other defense witnesses who, under cross examination, could not verify Simonini's actions. We request the space to outline that testimony and to be held accountable for our bold argument that the record supports facts the Court here concluded otherwise. The Court should consider the possible motive the Defendants had for mischaracterizing the witnesses concerns.

The bottom line is, if there is insufficient evidence to establish probable cause, there is only one alternative: conduct an investigation, and wait to make the arrest until such evidence is found, instead of making a premature, unconstitutional arrest of the wrong person.

E. With respect to Defendant Buccino, the Court Improperly Invaded the Domain of the Trial Court in its Fact Finding Contrary to the Trial Court's well-founded Findings

This was one of plaintiff's central points in its brief's on appeal, which it would appear the entire Court overlooked. E.g., Petition for Certification, January 23, 1999, Point II; Supplemental Brief, Points VI, VII. The Court does not find that the trial court misunderstood or misapplied the law with respect to defendant Buccino. It simply made a different finding of fact. This was an improper invasion of the domain of the trial court, it is respectfully submitted.

POINT VII

THE COURT ERRED IN IMPROPERLY INVADING THE FACT-FINDING ROLE OF THE TRIAL COURT

As discussed in the Petition for Certification, January 23, 1999, Point II, in relation to the Appellate Division, it is submitted that this Court similarly erred in improperly invading the fact-finding role of the trial court, and has cited no authority for departing from the cases cited.

CONCLUSION

Discretion is the better part of valor. If the Justices did not previously consider the issue of recusal because the matter had not been argued, researched or reviewed, because no formal challenge had been made, or if Justice Veniero perhaps followed the memo from his predecessor Attorney General--it does not matter. The Chief Justice and Justice Veniero have individual decisions to make. The other five Justices, including former Justice Garibaldi, also have an important ethical decision to make. Plaintiffs' legal research shows that the New Jersey Supreme Court has more stringent rules than many states and than the federal statutes. The New Jersey Supreme Court should remain a leader in ethics and not be perceived as compromising its integrity in a decision which, by coincidence, related to the Division of Criminal Justice's, the Chief Investigator, a senior State investigator, and numerous Deputy Attorney Generals directly under the Attorney General. We respectfully request that this motion be granted in all respects.

Dated: May 5, 2000

Respectfully submitted,

/s/Vincent J. D'Elia

ON THE BRIEF:
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